TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [illegible] 1914

No. [illegible].357

TEXAS & PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

WYATT JONES ROSBOROUGH, HOME INSURANCE COMPANY, NORTH BRITISH & MERCANTILE COMPANY, ET AL.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

FILED FEBRUARY 10, 1914.

(24,050)

(24,050)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 899.

TEXAS & PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

WYATT JONES ROSBOROUGH, HOME INSURANCE COMPANY, NORTH BRITISH & MERCANTILE COMPANY, ET AL.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Judicial Circuit.

Pleas and Proceedings Had and Done at a Regular Term of the United States Circuit Court of Appeals for the Fifth Circuit, Begun on the first Monday in November, A. D. 1913, at Fort Worth, Texas, Before the Honorable Don A. Pardee, and the Honorable David D. Shelby, Circuit Judges, and the Honorable Rhydon M. Call, District Judge.

TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
versus
W. J. ROSBOROUGH and Others, Defendants in Error.

Be it remembered, that heretofore, to-wit, on the 11th day of June, A. D. 1913, a transcript of the record of the above styled cause, pursuant to a writ of error to the District Court of the United States for the Eastern District of Texas, was filed in the office of the Clerk of the said United States Circuit Court of Appeals for the Fifth Circuit, which said transcript was filed and docketed in said Circuit Court of Appeals as No. 2520, as follows:

(a)

CAPTION

Be it remembered that at a term of the United States District Court in and for the Eastern District of Texas, at Jefferson, Texas, at its October term, A. D. 1912, and on October 15, 1912, in cause No. 582, wherein W. J. Rosborough was plaintiff, and The Texas and Pacific Railway Company and Home Insurance Company and other Insurance Companies were intervenors, a judgement was rendered in favor of W. J. Rosborough, and the Insurance Companies' intervenors and against the Texas & Pacific Railway Company for the sum of $34,297.00, and said judgment was corrected on February 29, 1913.

The following proceedings were had, to-wit:

TRANSCRIPT OF RECORD

United States
Circuit Court of Appeals
FIFTH CIRCUIT

No.....

TEXAS & PACIFIC RAILWAY COMPANY,
Plaintiff in Error.

versus

W. J. ROSBOROUGH AND INTERVENORS,

Home Insurance Company, North British & Mercantile Company, Phoenix Insurance Company of Hartford, Firemans Fund Insurance Company, Aetna Insurance Company,

Citizens Insurance Company of Missouri, Boston Insurance Company, Springfield Fire and Insurance Company, Royal Insurance Company, German American Insurance Company, Continental Insurance Company, Milwaukee Mechanics Insurance Company, Queen Insurance Company, Insurance Company of North America, Hamburg Bremen Insurance Company and Phenix Insurance Company of Brooklyn.

Defendants in Error.

In error to the United States Circuit Court af Appeals, Fifth Circuit, from the United States District Court, Eastern District of Texas, at Jefferson.

PLAINTIFF'S AMENDED ORIGINAL PETITION.

United States District Court for the Eastern District of Texas at Jefferson, Texas.

No. 582.

W. J. ROSBOROUGH

vs.

TEXAS & PACIFIC RAILWAY COMPANY.

To the Hon. J. Gordon Russell, Judge of Said Court:

Comes now the plaintiff, leave of Court being first had and obtained, and files this, his amended original petition, amending his original petition, filed in the District Court of Harrison County, Texas, on November 15th, 1911, so that the same shall hereafter read as follows:

Your petitioner, W. J. Rosborough, who will be styled herein plaintiff, complaining of the Marshall & East Texas Railway Company, the Texas & Pacific Railway Company, and the Marshall Compress Company, which will be styled defendants herein, represents and shows that the plaintiff resides in Marshall, Harrison County, Texas, and that the defendants, the Marshall & East Texas Railway Company and the Texas & Pacific Railway Company, are each railroad

corporations and common carriers of freight and passengers and have lines of railway running in and through Harrison County, Texas; and that the defendant Marshall Compress Company is a corporation duly incorporated and has a compress located in Marshall, Harrison County, Texas; that each of the said defendants have been cited and have answered herein.

The plaintiff shows that heretofore to-wit, on or about the 3rd day of March, 1910, he was the owner of and in possession of to-wit seven hundred and seventy bales of cotton, located on the platform and at the depot and at the cotton yard upon the Marshall & East Texas Railway in Marshall, Harrison County, Texas, and being desirious of shipping and moving the said cotton, the same was turned over by the plaintiff to the said Marshall & East Texas Railway Company at its yard in Marshall, Harrison County, Texas, to be by it transported to final destination, and that the said Marshall & East Texas Railway Company as such common carrier received the said cotton and undertook to transport the same to final destination, but that a large portion of the said cotton was placed by the Marshall & East Texas Railway Company at the Compress in Marshall, Harrison County, Texas, and in cars along and adjoining the said Compress, and while so placed the said cotton was, by reason of the negligence of the said Marshall & East Texas Railway Company, which had control and management of the said cotton, exposed to dangers of fire and which was set on fire and to-wit four hundred and twenty-one bales thereof destroyed, which property so destroyed was of the reasonable market value of the sum of to-wit, Twenty-nine thousand six hundred and sixty-four dollars and fifty cents on the said date of the fire, to-wit, the 8th day of March, 1910.

The plaintiff shows that the said defendant, Marshall & East Texas Railway Company is liable to the plaintiff for the value of the said cotton in that the said Marshall & East Texas Railway Company did not exercise ordinary care and prudence to care for the said cotton and protect the same

from destruction by fire, but negligently exposed the same to fire, and permitted the same to be set on fire and destroyed while the same was in the control and management of the said Marshall & East Texas Railway Company. That after the said Marshall & East Texas Railway Company had placed large portions of the said property at the Marshall Compress and while some of said cotton was in the cars at the said Compress, that the said Marshall & East Texas Railway Company caused certain cars to be moved and switched at the said Compress and caused fire which had caught in one of said cars to be communicated to and which destroyed four hundred and twenty-one bales of said cotton of the value of Twenty-nine thousand, six hundred and sixty-four dollars and fifty cents. That the Marshall & East Texas Railway Company, by reason of its said negligence as herein set out, became liable to the plaintiff for the value of the said cotton so damaged and destroyed, together with interest thereon at the rate of six per cent. per annum from date of the destruction thereof.

Th plaintiff further shows that the said cotton was at the Marshall Compress in Marshall, Harrison County, Texas, which is located and situated near the tracks of the Texas & Pacific Railway Company; and that while the said cotton was located and situated at the said Compress and in cars adjoining and near the said Compress that the Texas & Pacific Railway Company negligently set fire to, damaged, and destroyed the said cotton to the extent of damaging and destroying four hundred and twenty-one bales thereof, to the amount of Twenty-nine thousand, six hundred and sixty four dollars and fifty cents.

Plaintiff shows that the said cotton was damaged and destroyed by the negligence of the said defendant, the Texas & Pacific Railway Company in that the said defendant Texas & Pacific Railway Company set fire to the said cotton by sparks and fire that were emitted and discharged from its locomotives and engines by the negligence of the said railway company; in that the said Texas & Pacific Railway Company did not have the said locomotives and engines

which set fire to and burned the said cotton, equipped with proper spark arresters and appliances, and that the said engines and locomotives were not properly constructed and were not provided with proper appliances for preventing the escape of fire; and that the said Texas & Pacific Railway Company did not exercise proper care to keep the said engines, locomotives and appliances in good condition and repair as regards the escape of fire thereform; and that the employees of the Texas & Pacific Railway Company in the management, control and operation of the said locomotives and engines which set fire to the said cotton, did not handle and operate the same with proper care and caution as regards the escape of fire therefrom, but negligently and improperly handled and operated the said engines and locomotives so as to cause large quantities of sparks, cinders, and fire to escape therefrom, which ignited and set fire to the said cotton and destroyed the same.

The plaintiff further shows that the defendant Texas & Pacific Railway Company negligently set fire to and burned and damaged the cotton of plaintiff in that the said Texas & Pacific Railway Company was guilty of negligence in that it was using an inferior grade and kind of fuel and that the Texas & Pacific Railway Company was not using the proper character or quality or kind of fuel with which to generate steam in its locomotives and engines; in that it was using coal for generating steam and it could and should have used oil for fuel, and it was using an inferior grade and kind of coal when it could and should have used a better grade and kind of fuel which if used would not have caused the escape of sparks and cinders; and that by reason of the said Texas & Pacific Railway Company using an improper grade of fuel and an improper quality and an improper kind of fuel that large quantities of fire and sparks were emitted from its said locomotives and engines which set fire to, destroyed, and damaged plaintiffs cotton; that it was the duty of the said defendant Texas & Pacific Railway Company to have used a different kind of fuel and a better grade and quality of fuel than that used which would have prevented the said

property from being burned and damaged; and for the negligence of the said defendant the Texas & Pacific Railway Company in this respect, the said Texas & Pacific Railway Company is responsible to the plaintiff in damages for the loss sustained by plaintiff, to-wit the sum of twenty-nine thousand six hundred and sixty-four dollars and fifty cents.

That the said cotton was set fire to and destroyed by sparks that were negligently allowed to escape from the locomotives and engines of the Texas & Pacific Railroad Company either by reason of the said locomotives and engines not having been properly constructed, and provided with proper appliances for preventing the escape of fire; or by reason of the said Texas & Pacific Railway Company not having exercised proper care to maintain the said locomotives, engines, and appliances with which the same were provided for preventing the escape of fire in good condition and repair; or by reason of the said employees, servants and agents of the railway company having said engines and locomotives in charge and operating the same, having failed to operate the same with ordinary and proper care and caution as regards the escape of fire therefrom; or by the defendant Texas & Pacific Railway Company using an improper grade, quality and character of fuel or by using an improper kind of fuel; and that by reason of one or all such acts of the said Railway Company in not having its said engines and locomotives properly constructed and provided with proper appliances for preventing the escape of fire, or by not exercising proper care to keep the said engines and locomotives and spark arresters and appliances thereon in proper condition to prevent the escape of fire; or by reason of the said engines and locomotives having been improperly handled and not having been operated with ordinary and proper care and caution as regards the escape of fire therefrom; or by reason of an improper kind, grade or quality of fuel having been used, that the said cotton was set fire to, damaged, and destroyed to the plaintiff's damage in the sum of twenty nine thousand six hundred and sixty four dollars and fifty cents, and that the said defendant Texas & Pacific Railway

Company thereby became liable to the plaintiff for his said damages in the sum of twenty nine thousand six hundred and sixty four dollars and fifty cents, together with interest from the 8th day of March, 1910, at the rate of six per cent per annum.

The plaintiff further says that he is advised, informed and believes that the defendant Texas & Pacific Railway Company will claim that although it set fire to, damaged, and destroyed the said cotton of the plaintiff at the time and substantially under the circumstances herein set out in the preceding paragraphs of this petition, and that the said cotton was damaged and destroyed by reason of the negligence of the said Texas & Pacific Raliway Company, that notwithstanding the said negligence and said destruction of the said cotton by fire, that the Marshall Compress Company which it claims had control and charge of the said cotton, and which it claims was acting as agent for the said plaintiff, was also guilty of negligence which caused or contributed to cause the said cotton to be set on fire, damaged and destroyed in that the said Texas & Pacific Railway Company claims that the said Compress Company negligently and carelessly placed the said cotton so near the tracks of the said Texas & Pacific Railway Company where trains would be operated by engines and locomotives passing along the said tracks near the said cotton and that the same was placed so close to the said tracks that it would be set fire to and destroyed by the engines and locomotives of the said Railway Company in permitting sparks and fire to escape therefrom.

The plaintiff shows that if the said Marshall Compress Company did actually store or place the said cotton near or contiguous to the tracks of the Texas & Pacific Railway Company or in such close proximity thereto that the same was thereby set fire to and destroyed by reason of sparks escaping from the locomotives and engines of the said Texas & Pacific Railway Company, that the same was so placed and exposed without the knowledge, permission, or consent of the said plaintiff, and that for the negligence of the said

Marshall Compress Company in so placing and exposing the said cotton of plaintiff to such hazards and dangers, the said Marshall Compress Company became liable to plaintiff for such damages as resulted to the plaintiff from a destruction of the said cotton by being set fire to and destroyed by fire escaping from the engines and locomotives of the said defendant Texas & Pacific Railway Company. That if the said defendant Marshall Compress Company was guilty of negligence in exposing the said property to fire as herein set out, it is liable to the plaintiff for the value of the said cotton so damaged and destroyed, to-wit in the sum of twenty nine thousand six hundred and sixty four dollars and fifty cents; and the plaintiff here charges that the said Marshall Compress Company did actually store and place the said cotton so near the railroad tracks of the said Texas & Pacific Railroad Company and did so negligently expose the said cotton to fire and sparks which escaped from the engines and locomotives of the said Railway Company, at said time and place, and that the said cotton was thus destroyed by the negligence of the said Compress Company in so exposing the said cotton to fire escaping from said engines and locomotives of the said Texas & Pacific Railway Company and that the said Marshall Compress Company thereby became liable to the plaintiff in the full value of the said cotton so damaged and destroyed by fire in to-wit the sum of twenty nine thousand six hundred and sixty four dollars and fifty cents, together with interest thereon from the 8th day of March, 1910, at six per cent per annum.

The plaintiff shows that the said property was destroyed by reason of the negligence of the said defendants or some one of them as herein set out, and at the time the same was destroyed it was of the value of twenty nine thousand six hundred and sixty four dollars and fifty cents. That the interest thereon from the date of the destruction of the said fire at six per cent amounts to four thousand five hundred and ninety seven dollars and ninety eight cents to the 8th day of October, 1912, and that the said interest thereon is a part of the damages sustained by the plaintiff and caused

by and incidental to the negligent destruction of his property, and that he is entitled to recover the said sum as a part of his damages herein.

Wherefore the plaintiff prays that upon final hearing hereof, the plaintiff have judgment against each and all the said defendants, jointly and severally or individually to the said plaintiff under the evidence for the damage and value of the said cotton damaged and destroyed by fire in to-wit the sum of twenty nine thousand six hundred and sixty four dollars and fifty cents, with interest thereon at the rate of six per cent per annum from the 8th day of March, 1910, for all costs of suit and for general relief.

S. P. JONES,
Attorney for Plaintiff W. J. Rosborough.

Filed Oct. 8, 1912. J. R. BLADES, Clerk.
United States District Court for the Eastern District of Texas.

INTERVENTION HOME INSURANCE COMPANY ET AL.

In the United States District Court for the Eastern District of Texas at Jefferson, Texas.

W. J. ROSBOROUGH
vs.
TEXAS & PACIFIC RAILWAY CO.

Now comes the Home Insurance Company, a body politic created and existing under the laws of the State of New York and in vacation files this its plea of intervention in said cause, and shows that it is interested therein.

The said intervenor shows that at and before the time the property set out and described in plaintiffs petition in this cause was destroyed by fire, that the said intervenor had issued its certain certificate or policy of insurance to the said plaintiff insuring him against certain loss upon said property by fire and that thereafter and before said suit was filed, the said intervenor paid to the said W. J. Rosborough its proportion of the said loss, in the sum of to-wit $1000.00

and by the terms of the insurance policy upon the said property the said intervenor was entitled to be subrogated to the extent of the said payment to any recovery against the defendant herein, and that upon the payment by the said intervenor to the said W. J. Rosborough that the said W. J. Rosborough executed a subrogation or assignment agreement, fully recognizing the rights of the intervenor in said cause of action.

Wherefore the said intervenor here adopts all of the pleadings of the said plaintiff in said cause of action and prays for the judgment as prayed for by the said plaintiff and prays that his interest in said recovery be fixed in accordance with the amount that intervenor paid the said W. J. Rosborough in settlement of the said loss.

S. P. JONES,
Attorney for Intervenor.

United States District Court for the Eastern District of Texas at Jefferson, Texas.

W. J. ROSBOROUGH

vs.

TEXAS & PACIFIC RAILWAY COMPANY.

Come now the following persons and corporations by leave of court first had, and intervene in the said cause and pray that they be styled intervenor herein as follows:

North British & Mercantile Company, Phoenix Insurance Company of Hartford, Firemans Fund Insurance Company, Aetna Insurance Company, Citizens Insurance Company of Missouri, Boston Insurance Company, Springfield Fire & Marine Insurance Company, Royal Insurance Company, German American Insurance Company, Continental Insurance Company, Milwaukee Mechanics Insurance Company, Queen Insurance Company, Fidelity Fire Insurance Company, Insurance Company of North America, Hamburg Bremen Insurance Company and Phoenix Insurance Company of Brooklyn.

The said intervenors each and all being corporations duly

incorporated as indicated, represent and show that they are interested in the said cause of action in this:

That at the time of the fire they carried insurance upon the said cotton, and that after the fire on to-wit about the 15th day of December 1911, they made certain payments to the said plaintiff and procured subrogations and transfers of an interest in said cause of action to the extent of the said payments so made. That each of the said intervenors made payments of the amounts indicated herein and are entitled to recover of the judgment that may be rendered in favor of the plaintiff herein the said amounts so paid by each and for which subrogations and transfers were duly signed as follows:

North British & Mercantile Company	$1884.31
Phoenix Insurance Company of Hartford	538.38
Firemans Fund Insurance Company	538.38
Aetna Insurance Company	2961.07
Citizens Insurance Company of Missouri	2691.90
Boston Insurance Company	269.19
Springfield Fire & Marine Insurance Company	1076.75
Royal Insurance Company	1076.75
German American Insurance Company	538.38
Continental Insurance Company	538.38
Milwaukee & Mechanics Insurance Company	1076.75
Queen Insurance Company	1076.75
Fidelity Fire Insurance Company	538.38
Insurance Company of North America	538.38
Hamburg Bremen Insurance Company	269.19
Phoenix Insurance Company of Brooklyn	1076.75
Home Insurance Company	1000.00

Wherefore the intervenors jointly and severally pray that judgment be rendered in favor of each for the said

amounts set opposite their names herein for all costs of suit and for general relief.

JNO. S. PATTERSON,
S. P. JONES AND WM. THOMPSON,
Attorneys for Plaintiff and Intervenors.

Filed Oct. 8, 1912. J. R. BLADES, Clerk.
United States District Court for the Eastern District of Texas.

FIRST AMENDED ANSWER OF THE DEFENDANT, THE TEXAS & PACIFIC RAILWAY CO.

In the United States District Court for the Eastern District of Texas, Jefferson Division.

C. L. No. 582.

W. J. ROSBOROUGH, Plaintiff,

vs.

THE TEXAS & PACIFIC RY. CO. ET AL, Defendants.

Now comes the Defendant, the Texas & Pacific Railway Company in this cause and files the following answer:

First.

The Defendant demurs to Plaintiff's petition and says the matters and things therein alleged show no cause of action against this Defendant. This Defendant especially demurs to Plaintiff's petition because it does not show wherein nor in what way the fuel used on the locomotives was improper or unsale fuel. It does not show that there is any other fuel that this Defendant could have procured and used on its locomotives by any reasonable or practicable effort.

It does not show what kind of fuel this Defendant should have used instead of the coal.

There are several kinds of power that may be used to propel cars; wood or coal or gas or electricity may be used as power, but the Plaintiff has not alleged which one of these fuels or these powers should have been used by this Defendant, and he has not alleged any facts showing that, coal, wood, gas, oil or electricity could have been obtained

by this defendant by ordinary effort and reasonable care.

Wherefore he prays that the Plaintiff be compelled to set out more specifically what constituted the negligence in this regard.

Second.

This efendant denies each and every allegation in Plaintiff's petition, and says it is not guilty of the wrongs and trespasses therein charged against it, and of this puts itself upon the country.

Third.

This Defendant says that the Plaintiff ought not to recover against it, because the said W. J. Rosborough had taken out policies of insurance on the cotton that was destroyed for the value of which he sues, and the said policies of insurance contain what is known as the subrogation clause, which required the said Rosborough to transfer to the Insurance Company his claim against any person or Company for burning the cotton if the Insurance Company should pay the policy.

The Defendant says that the following Insurance Companies have paid to the said Rosborough the amounts set opposite their names, and the said Rosborough, heretofore by a written instrument transferred and assigned to said Insurance Companies all right, title and claim which he might have had against the Texas & Pacific Railway Company or any other Company or person growing out of the destruction of said cotton, and that thereby the said Insurance Companies became the legal owners of whatever cause of action the Plaintiff may have had against this Defendant That the names of said Insurance Companies and the amounts paid to the Plaintiff, are as follows, to-wit:

North British & Mercantile Co.	$1884.31
Phoenix Insurance Co. of Hartford	538.38
Firemans Fund Insurance Company	538.38
Aetna Insurance Company	2961.07
Citizens Insurance Company of Missouri	2691.90
Boston Insurance Company	269.19
Springfield Fire & Marine Insurance Company	1076.75

Royal Insurance Company	1076.75
German American	538.38
Continental Insurance Company	538.38
Milwaukee & Mechanics Insurance Company	1076.75
Queen Insurance Company	1076.75
Fidelity Fire Insurance Company	538.38
Insurance Company of North America	538.38
Hamburg-Bremen Insurance Company	269.19
Phoenix Insurance Company of Brooklyn	1076.75
Home Insurance Company	1000.00
Total	$17,689.69

Wherefore this Defendant says says that the Plaintiff is not entitled to recover the said amounts paid to him by said Insurance Companies nor to sue for and recover any damages on account of the destruction of any cotton covered by policies from said Companies.

Fourth.

This Defendant says that the Plaintiff is not entitled to recover because prior to the fire, he had placed his said cotton in the custody of the Marshall Compress Company, which owns and controls said Compress at Marshall, Texas, and said Compress Company thereby became the agent and represented the said Rosborough. That said Company negligently placed a part of said cotton out on the platform near to the main line track of the Texas & Pacific Railway in an exposed condition and uncovered. That it also exposed other cotton to sparks. That it allowed large quantities of loose lint cotton to be scattered around on the platform near the main line of the Railway in an exposed condition, and allowed and permitted numbers of bales of cotton with the hoops broken off them and portions of the bale to remain uncovered by the bagging and to remain in said platform near the main line of the Texas & Pacific Railway in such condition. That the Plaintiff was also aware of such conditions.

This Defendant further says that from the depot westward the Texas & Pacific Railway ascends a steep grade, so

steep that whenever a long train is proceeding west, it is necessary for the switch engine, which is kept in Marshall, to assist the said train over said grade by pushing behind it.

That about seven hundred yards west of the depot, on a part of this ascending grade, the said Compress of the Marshall Compress Company is located the railroad running east and west and the compress is located on the north side of the railroad. That at that point, the Railroad Company built a switch or spur track on the north side of the main line and about fifty-five feet from the main line of the railroad, the compress platform is built up on the north side of this switch or spur track and is built up to the track.

That the said Compress platform is about three hundred feet long and is about three hundred feet east and west bordering on the sidetrack and extends over on this Defendant's right of way about forty feet the full length of the platform. That said platform is about two hundred feet wide north and south. That it was proper and permissable for the Compress Company to have its platform extend out to border the said switch or spur track to be used for loading and unloading cotton on to and out of the cars situated on said spur track, but that it was not proper for the said Compress Company to store cotton on this strip of the platform near the side-track and allow it to remain there exposed to the sparks of passing engines on the main line of the railroad.

That the Compress Company did place on said strip or platform near the side-track, large quantities of cotton in bales, many of them with the hoops off and the lint cotton exposed, with no covering, and allowed said cotton to be sampled at that place and large quantities of lint cotton scattered around on that portion of the platform.

That said Compress is situated on a steep up grade.

That an engine pulling train on an ascending grade would necessarily throw more sparks than an engine proceeding down grade on the level ground.

That this Defendant used coal in its engines for fuel and not oil nor any other fuel.

That when coal is used for fuel more sparks are thrown

from the engine and it is more liable to start fires than when oil is used for fuel.

That the Compress Company is situated at a curve in the railroad track, and a curve causes an engine to throw more sparks than it would on a straight line.

That locomotive engines which use coal for fuel, necessarily throw some sparks when using the best of spark arresters and when they are in perfect repair and operated carefully.

That the Plaintiff or the said Compress Company voluntarily placed cotton in an exposed condition near the railroad tracks along which more than twenty engines were operted every day.

That cotton even in bales is a very combustible material, and that when the bagging or covering is off the bales and when loose cotton is exposed, it is much more combustible than when it is in bales and covered with bagging.

That all of the facts and conditions enumerated were well known to said Compress Company and to the Plaintiff and said Company was negligent as above set forth and by its negligence contributed to cause the destruction of said cotton and for this reason the Plaintiff cannot recover.

That the Plaintiff was also negligent in taking no action himself under the circumstances for the protection of his cotton and by his negligence contributed to its destruction.

Fifth.

That the Compress Company or Rosborough sustained no contractual relations with this Defendant with reference to the handling of said cotton, but that said Compress Company did have a contract with Rosborough the Plaintiff which bound the said Compress Company to take care of said cotton.

This Defendant is operated under a charter granted by the Congress of the United States which authorized it to use steam power and to use such fuel as is proper and necessary to operate its engines, and that it has procured a right of way one hundred feet on the north side at this point, and that it used ordinary care and precaution and use the most

approved and best appliances in use on well managed railroads in this country to prevent the setting out of any fire on account of the escape of sparks.

That the said spark arresters were in good repair at the time of said fire and it exercised ordinary care to procure and use the best spark arrestors in general use on railroads in this country and to have its locomotives carefully operated by skilful engineers who were handling the same and that if the fire complained of was set out by any sparks escaping from any one of its locomotives it was not the fault of any negligence on the part of this Defendant, and it is not responsible for the same and it says whatever duty this Defendant owed to the Plaintiff Rosborough, to avoid the fire was less than the duty owed to said Rosborough by the Defendant the Compress Company to protect it from fire.

Therefore, it prays that it may be protected against any judgment that may properly be rendered in favor of the said Rosborough and that if any judgment is rendered in his favor that the judgment be against the Compress Company and for such other judgment as may be necessary to its indemnity and protection.

Sixth.

That it is not feasible but is wholly impracticable for the Texas & Pacific Railway Company to use oil as fuel instead of coal and to require the use of oil would impose an unreasonable burden upon it. That it has no more engines and locomotives now nor did it have at the time of and prior to the fire complained of than is and was constantly needed for use. That to change from coal to oil would take each locomotive out of use while the change was being made and would cost on an average of $500 to each locomotive. That said Defendant would be required to erect oil stations and proper storage tanks at many places along its road and would be required to haul the necessary oil for a great distance to be stored for use and in doing so, would have to have it hauled over other railroads a great distance. That the expenses in doing this would be enormous. That both the price and the supply of oil as fuel is uncertain, fluctuat-

ing and precarious. That by reason thereof it cannot procure any contracts from oil producers to furnish oil at any certain price in the future or for such length of time as would justify to make necessary the changes to use oil as fuel.

That in the exercise of ordinary care, it was found that coal was the only fuel practicable to use under all the circumstances of its situation and existing conditions.

Seventh.

Further answering herein the Defendant herein says that at the time of and prior to the fire, complained of, and with reference to the locomotives and engines passing the Compress and of which complaint is made, it used ordinary care to procure and use the most approved and best appliances in general use on railroads in this country to prevent the setting out of any fire on account of the escape of any sparks. That it exercised ordinary care to keep its spark arrestors in good repair at the time of said fire and that it exercised ordinary care to have its locomotives carefully operated by competent engineers who were handling the same and that said engineers exercised ordinary care in the proper handling of said locomotives to prevent the setting out of fire escaping from them. That if the fire complained of was set out from any of the sparks escaping from any of its locomotives, it was not the result of any negligence on the part of this Defendant.

Wherefore, the Defendant, the Texas & Pacific Railway Company, prays that it be discharged and for such other orders and judgments as it may be entitled to under the laws and facts of the case.

F. H. PRENDERGGAST,
GLASS, ESTES, KING & BURFORD,
Attorneys for said Defendant.

Filed Oct. 8, 1912. J. R. BLADES, Clerk.

United States District Court for the Eastern District of Texas.

FIRST SUPPLEMENTAL ANSWER TO ITS FIRST AMENDED ANSWER AND IN ANSWER TO THE PLEAS OF INTERVENTION BY DEFENDANT T. & P. RY. CO.

In the United States District Court for the Eastern District of Texas, Jefferson Division.

No. ....

W. J. ROSBOROUGH, Plaintiff,

vs.

THE TEXAS & PACIFIC RY. CO. ET AL, Defendants.

Now comes the Defendant, the Texas & Pacific Railway Company and by leave files this answer to the pleas of the intervenors supplemental to its first amended answer, and in answer to the plea of the intervention filed herein by the Home Insurance Company, and by the other Insurance Companies named in their plea of intervention, says:

First.

Now comes the Defendant, the Texas & Pacific Railway Company, and adopts its answer filed herein in response to the Plaintiffs petition and in reply to same as its answer to said pleas of intervention, and prays that the same be considered as its answer to said plea of intervention and that upon final trial it be discharged with its costs.

Second.

The Defendant the Texas & Pacific Railway Company in further answer to said plea of intervention says that the said Insurance Companies before issuing to Plaintiff the policies of Insurance on which they afterwards made a settlement with the Plaintiff covering loss on cotton involved in this suit, went to the Compress of said Marshall Compress Company of Marshall, Texas, and examined the grounds and platforms and buildings of said Company and measured the distance of each of same from the railroad's main line and sidetrack and ascertained all the facts as to the situation and conditions.

That the cotton covered by the policies which is issued was in the custody of the said Marshall Compress Company and said Insurance Companies knew of the situation and conditions and that said cotton was in the custody of said

Compress Company and would be handled by it with other cotton and knew of the liklihood of said cotton catching fire from escaping sparks and took the risk of all of the acts of said Compress Company in the handling of said cotton at its Compress and upon its platforms and took the risk of the conditions which might be permitted by the said Compress Company, which might endanger said cotton.

That said Insurance Companies took the risk of the handling of said cotton by the owner thereof the Plaintiff in this case and of his acts in permitting others to handle said cotton.

That the Plaintiff and said Compress Company were guilty of negligence as fully stated and set forth in the answer filed by this Defendant to the cause of action plead by the Plaintiff and it now adopts all of the allegations in reference thereto and says that by reason thereof, it is not liable to said Insurance Companies and of this it prays judgment.

F. H. PRENDERGAST,
GLASS, ESTES, KING & BURFORD,
Attorneys for Defendant.

Further answering the Defendant says that the cause of action set up by the said Insurance Companies is for damages caused by a fire on the 8th day of March, 1912, alleged to be due to the negligence of the Defendants in this cause, and more than two years had expired before the institution and filing of thier suits to recover herein, and therefore at the time of the filing of their pleas of intervention and suit to recover against this Defendant their cause of action if any they ever had was barred by the statute of two years limitation, and the said Defendant now pleads said statute of two years limitation in bar of the right of all and each of

said Insurance Companies to recover herein, and of this prays judgment.

F. H. PRENDERGAST,
GLASS, ESTES, KING & BURFORD,
Attorneys for said Defendant.

Filed Oct. 8, 1912. J. R. BLADES, Clerk.
United States District Court for the Eastern District of Texas.

CORRECTED JUDGMENT.

W. J. ROSBOROUGH
vs.
TEXAS & PACIFIC RAILWAY COMPANY.

On this the 27th day of February, 1913, came on to be heard the motion of plaintiff and intervenors to have the judgment heretofore entered on the 15th day of October, 1912, corrected, and after considering the same the said application and motion is granted, and the said judgment is corrected and here entered so as to read as follows, to-wit:

On this the 8th day of October, 1912, came on to be heard the above cause and all parties plaintiff, intervenors and defendants appeared by their respective attorneys and announced ready for trial. Thereupon came a jury of good and lawful men to-wit, S. G. Grandberry, foreman and eleven others, who were duly empaneled to try said cause, and the trial of the said cause proceeded from day to day until the 12th day of October, 1912, when the said jury, after having heard all of the evidence, and having been instructed by the court as to the law herein, retired to consider of their verdict, and after having duly considered the same, on to-wit the 15th day of October, 1912, returned into open court the following verdict:

We, the jury, find verdict for the plaintiff, W. J. Rosborough and the intervenors against the defendant the Texas & Pacific Railway Company for amount sued for, Twenty nine thousand six hundred and sixty four dollars and fifty cents, with six per cent from March 8, 1910, to October 15,

1912, amounting to four thousand six hundred and thirty two dollars and fifty six cents. Of which amount so found in favor of plaintiff and intervenors, we find for intervenors as follows:

North British & Mercantile Company	$1985.43
Phoenix Insurance Company of Hartford	567.49
Firemans Fund Insurance Company	567.49
Aetna Insurance Company	3173.59
Citizens Insurance Company of Missouri	2836.36
Boston Insurance Company	283.63
Springfield Fire & Marine Insurance Company	1134.53
Royal Insurance Company	1134.53
German American Insurance Company	567.74
Continental Insurance Company	567.74
Milwaukee & Mechanics Insurance Company	1131.48
Queen Insurance Company	1134.53
Fidelity Fire Insurance Company	567.74
Insurance Company of North America	566.10
Hamburg Bremen Insurance Company	283.00
Phoenix Insurance Company of Brooklyn	1133.63
Home Insurance Company	1346.10

S. G. GRANDBERRY,
Foreman."

It is therefore adjudged, decided and decreed that the plaintiff W. J. Rosborough and intervenor the Marshall National Bank have and recover of and from the Defendant the Texas & Pacific Railway Company the sum of fifteen thousand three hundred and fifteen dollars and ninety five cents, ($15,315.95.)

It is further adjudged, decided and decreed that the intervenors have and recover of and from the defendant Texas & Pacific Railway Company the following amounts:

North British & Mercantile Company	$1985.43
Phoenix Insurance Company of Hartford	567.49
Firemans Fund Insurance Company	567.49
Aetna Insurance Company	3173.59
Citizens Insurance Company of Missouri	2836.36
Boston Insurance Company	283.63

Springfield Fire & Marine Insurance Company	1134.53
Royal Insurance Company	1134.53
German American Insurance Company	567.74
Continental Insurance Company	567.74
Milwaukee & Mechanics Insurance Company	1131.48
Queen Insurance Company	1134.53
Fidelity Fire Insurance Company	567.74
Insurance Company of North America	566.10
Hamburg Bremen Insurance Company	283.00
Phoenix Insurance Company of Brooklyn	1133.63
Home Insurance Company	1346.10
Total	$18,981.11

Making total amount recovered by plaintiff and said intervenors the sum of thirty four thousand, two hundred and ninety seven dollars and six cents, ($34,297.06.)

It is further adjudged and decreed that the Marshall & East Texas Railway Company go hence without day and recover of and from the plaintiff its costs herein.

It is further adjudged, decided and decreed that the Marshall Compress Company go hence without day and recover of the plaintiff W. J. Rosborough its costs herein.

It is further adjudged, decided and decreed that the Texas & Pacific Railway Company pay all costs incurred herein except the costs incurred by the Marshall & East Texas Railway Company and the Marshall Compress Company.

It is further adjudged, decided and decreed that this judgment bear interest from this the 15th day of October, 1912, at six per cent per annum.

It is further adjudged and decreed that execution issue in behalf of plaintiff and intervenors for amounts adjudged to them herein.

GORDON RUSSELL,
Judge.

Filed Feb. 27, 1913. J. R. BLADES, Clerk.
United States District Court for the Eastern District of Texas.

PETITION FOR A NEW TRIAL.

W. J. ROSBOROUGH, ET AL,

vs.

TEXAS & PACIFIC RAILWAY COMPANY, ET AL.

On Motion for a New Trial.

Personally appeared V. A. McCulloch before me the undersigned authority and on oath says that he is the Chief Train Dispatcher on the Eastern division of the Texas & Pacific Railway Company at Marshall, Texas, that his jurisdiction extends over that part of the track which passes the Marshall Compress about one-half mile west of the depot in Marshall. That he has examined the train sheet in the dispatchers office at Marshall, Texas, which is kept under the supervision of affiant to see what train passed the compress on March 11, 1910. He finds that freight train No. 2 and 23, engine 278, left Marshall at six o'clock a. m. on March 11, 1910, and train No. 157 engine 293 left Marshall at one-forty p. m. on March 11, 1910. That these were all the freight trains passing the compress company going west from six o'clock a. m. to one-forty p. m. on March 11, 1910. That train No. 1, which is a passenger train left Marshall going west and passed the compress at nine forty-five a. m. on March 11, 1910. That these three trains were the only ones that passed between six a. m. and one-forty p. m. on March 11, 1910. That he is enabled to make these statements from an examination of the train sheet kept in his office. That the train sheet shows correctly the time that each train left Marshall for the west and that no train left Marshall for the west on March 11, 1910, nor on any other day without its being shown on the train sheet and that the said train sheet is absolutely reliable as to what trains pass over the road, and further the deponent sayeth not.

V. A. McCULLOUGH.
Chief Dispatcher T. & P. Ry. Co.

State of Texas, County of Harrison. Before me, the undersigned authority, this day personally appeared V. A. Mc-

Cullough, Chief Dispatcher T. & P. Ry. C. at Marshall, to me well known, and who, after being by me, duly sworn, did depose and say the matters set forth in the attached statement are true and correct to the best of his knowledge and belief. Sworn to and subscribed before me, this 9th day of November A. D. 1912. JESSE I. CARTER,

(Seal) Notary Public Harrison County, Texas.

W. J. ROSBOROUGH

vs.

THE TEXAS & PACIFIC RY. CO. ET AL.

In the United States District Court for the Eastern District of Texas at Jefferson, Texas.

Motion for a New Trial.

Now comes the defendant the Texas & Pacific Railway Company and presents this, its petition for a new trial and shows to the court that a new trial should be granted in the above cause for the following reasons:

First.

The verdict is not sufficient to dispose of all the parties litigant in this cause.

This suit is a suit by W. J. Rosborough against the Texas & Pacific Railway Company alleging that it negligently threw fire from its engines and burned cotton belonging to the plaintiff.

It is also a suit against the Marshall & East Texas Railway Company in which plaintiff alleges that the Marshall & East Texas Railway Company, as a common carrier, failed in its duty to deliver the cotton entrusted to it, and negligently caused a portion of the cotton to be burned.

It is also a suit against the Marshall Compress Company, in which it is alleged by plaintiff that the plaintiff had placed his cotton in the possession of the Marshall Compress Company and that the Compress Company negligently placed the cotton so near the Railroad track that it was destroyed by fire started from sparks from the Railroad engine.

Certain Insurance Companies having paid for a portion of the cotton took an assignment of his claim against the

Railroad company and intervened in the case and claimed a right to recover for the value of the cotton on which they had paid insurance.

The actual litigation was between the plaintiff and the Insurance Companies on one hand and the Texas & Pacific Railway Company and the Compress on the other, it being alleged by the Texas & Pacific Railway Company that the Compress Company was negligent in placing the cotton where it would burn.

The jury found a verdict in favor of Rosborough against the Texas & Pacific Railway Company and there is no finding as between the Railway Company and the Compress Company, or as between Rosborough and the Compress Company.

Under the course taken by the litigation and the agreement of the parties during the trial, we do not object to the verdict as being sufficient to dispose of the case in favor of the Marshall & East Texas Railway Company, but we do object to the verdict as being insufficient in disposing of the case as to the Marshall Compress Company, one of the defendants, as there is no finding for or against that company in either branch of the case.

Second.

The plaintiff introduced his evidence tending to show that sparks from the engine started the fire in the cotton and then proved the value of the cotton and closed the case. The defendant, the Texas & Pacific Railway Company, then introduced its evidence tending to show that it used the most approved spark arrestors and that they were in good repair and carefully handled on the occasion in question. That the evidence showed without contradiction that the fire must have been started, if started by an engine at all, by one of the three engines either engine 359, pulling the passenger train, or engine 202 pulling the freight train or the switch engine 140, which pushed the other two trains over the hill west of Marshall, a few minutes before the fire was discovered.

Then after the defendant closed, the plaintiff placed C.

L. Edwards, a witness, on the stand, who testified that on the 11th day of March, 1910, three days after the cotton had been burned, he saw an engine pass the compress going west on the Texas & Pacific Railway, about eleven o'clock a. m. throwing large cinders, some of which he exhibited in court. This evidence was objected to when offered, by the Texas & Pacific Railway Company, because it was not in rebuttal to any evidence introduced by the defendant Railway, and if introduced at all it should have been introduced in opening the case. It was further objected to, because the engine spoken of by the witness was not shown to have been one of the three engines that was near the compress when the fire started. The court overruled this objection.

It will be observed by the court that the defendant company confined its evidence to the condition and operation of the three engines mentioned above, and did not introduce any evidence as to the condition of other engines.

The plaintiff on cross examination of the Railway witnesses, had them testify that all the Texas & Pacific engines were in good condition and constructed like the ones testified about, and then the plaintiff claimed the right to introduce the witness, Edwards, to contradict the evidence brought out alone by the plaintiff on cross examination.

We submit that it is not lawful for the plaintiff to introduce evidence on cross examination for the mere purpose of contradicting it by evidence that would not be admissable except for the cross examination.

We understand this to be a well established rule.

It will be observed that the plaintiff waited until the close of the case to introduce this very important evidence, at a time when the Railway Company had no opportunity nor occasion to make an investigation to see whether it denied and disproved or qualified and explained the evidence of Edwards.

Since the trial of the case the Texas & Pacific Railway has investigated the matter and find from the train sheet, kept by the train dispatcher, that there was no train passing the Compress Company at the time stated by Edwards in hi-

evidence, he having stated, that a train passed there between eleven and twelve o'clock on the 11th day of March, 1910.

We append hereto the affidavit of V. A. McCullough, chief train dispatcher of the Texas & Pacific Railway Company, showing that no train could have passed without it being shown on the train sheet, and that the train sheet does not show any train passing at the time Mr. Edwards stated that it passed. So Mr. Edwards must have been in error in stating the time and the day that the train passed there which threw the sparks spoken of by him.

Third.

The court erred in refusing the special charge requested by the defendant to the effect that if the cotton that caught fire first was stored on the right-of-way of the Texas & Pacific Railway, and if it had not been stored on the right of way of the Texas & Pacific Railway, it would not have caught on fire, then the jury should find for the Texas & Pacific Railway Company. We maintain that this charge ought to have been given to the jury because,

First—It was proven without contradiction that the Railroad owned one hundred feet of right of way there, and that the cotton where the fire started was stored on the platform eighty-four feet from the main line of the Railway, from which line the sparks must have come.

It was proven that no cotton beyond the one hundred foot line was caught by the sparks, but the fire was carried from the fire that started on the right of way.

In Texas the law requires of Railway Companies to show the following care with reference to starting fires from their engines:

First—It must have the most approved spark arrestors.

Second—It must have them in good repair.

Third—They must be operated carefully.

Fourth—They must keep their right of way clear from combustible material.

If it does all of these, then it is not liable for damages

caused by fire coming from its engines.

The courts have held that if the Railroad allows combustible material to accumulate on his right of way it would be liable for fires started from its engines no matter how good the spark arrestors may be and how carefully handled.

Fourth.

We respectfully suggest to the court that in this case injustice has been done the Railway Company by the verdict rendered herein.

It appears that the Railroad Company built a spur track reaching out to the platform, but no harm had come from the extension of the spur track. It appears that the Compress Company selected its own location for its platform and stored cotton on that occasion within eighty-four feet of the main line of the railroad that it was there by sufference and it appears not to be paying anything for the privilege. That it is on a steep up hill grade, for all the engines must necessarily labor in climbing the hill and are therefore more liable to throw sparks.

It is shown that on the day in question, there was a high wind blowing from the south which carried the sparks directly from the engine to the cotton. It appears there was no person on guard on the platform to watch the cotton while these trains were passing, although there was in this case some $30,000.00 worth of cotton in danger. It appears that the undisputed evidence designates one of three engines as having started the fire. It was shown that these two engines were using the best spark arrestors, were in good repair and were handled carefully, and this evidence is attacked only by proving the fact that the fire was really communicated from one of the engines.

It has been held in a number of cases that if our evidence was true we have rebutted any presumption of negligence that arises from the fact that the engine started the fire. If the fact that the engine started the fire is sufficient to disprove and rebut the evidence showing good spark arrestors and in good repair and well managed, in this case then there is no reason why it would not be sufficient in any case.

The court erred in refusing the special charges requested.

F. H. PRENDERGAST,
Attorney for Texas & Pacific Railway Co.

Filed Jan. 11, 1913. J. R. BLADES, Clerk.
United States District Court for the Eastern District of Texas.

ORDER GRANTING FORTY-TWO DAYS STAY.

In the United States District Court for the Eastern District of Texas at Jefferson.

No. 582.
W. J. ROSBOROUGH,
vs.
THE TEXAS & PACIFIC RY. CO. ET AL.

On the application of the Texas & Pacific Railway Company in the above cause.

It is ordered that execution be stayed for forty-two days to allow the Texas & Pacific Railway Company to prepare and file and present its motion for a new trial and bills of exceptions.

And the cause is retained and kept open for that purpose and also to allow bills of exceptions to be settled, allowed and filed.

GORDON RUSSELL,
October 15, 12. Judge Presiding.

Filed Oct. 15, 1912. J. R. BLADES, Clerk.
United States District Court for the Eastern District of Texas.

ORDER EXTENDING TIME.

W. J. ROSBOROUGH ET AL
vs.
TEXAS & PACIFIC RAILWAY CO. ET AL.
Suit Pending in the Federal Court at Jefferson, Texas.

Whereas a verdict was rendered in the above cause at

Jefferson in favor of the plaintiff on October 15, 1912, and the court ordered a stay of execution and kept the case open for forty-two days to allow the Texas & Pacific Railway Company time to prepare and present its motion for a new trial.

It is now further ordered that the time be extended until January 15, 1913, in which time the plaintiff may prepare and present its motion for a new trial and execution is further stayed until that date. The cause is kept open until that date for the preparation of a bill of exceptions.

GORDON RUSSELL, Judge.

It is agreed that the above order may be made by the District Judge.

S. P. JONES,
Attorney for Plaintiff and Intervenors.
F. H. PRENDERGAST,
Attorney for Defendant.
JOHNSON & EDWARDS,
BEARD & DAVIDSON,
Attorneys for Defendant Compress Company.

Filed Nov. 11, 1912. J. R. BLADES, Clerk.
United States District Court for the Eastern District of Texas.

JUDGE'S ORDER ON PETITION FOR NEW TRIAL.

W. J. ROSBOROUGH
vs.
THE TEXAS & PACIFIC RAILWAY CO. ET AL.

Sherman, Tex., Jan. 11, 1913. This day came on to be heard the application of the Texas & Pacific Railway Company to be allowed to file its petition for a new trial.

And the court after hearing the application and the argument of the parties thereon, doth order as follows that the Clerk of this Court be and he is hereby directed to file said petition for a new trial, and the court further orders that this case be kept open until the Jefferson term, commencing

at the Jefferson Division of this court on February 17, 1913.

GORDON RUSSELL, Judge.

Filed Jan. 11, 1913. J. R. BLADES, Clerk.

United States District Court for the Eastern District of Texas.

ORDER OVERRULING MOTION FOR NEW TRIAL AND EXTENSION OF TIME.

In the United States District Court for Eastern District of Texas at Jefferson.

W. J. ROSBOROUGH

vs.

THE TEXAS & PACIFIC RAILWAY CO. ET AL.

February 27, 1913. Judgment having been given for the plaintiff in above and the Texas & Pacific Railway Company having presented a petition for a new trial which was by the court ordered filed and the hearing thereof continued over to be heard at this the February term of court at Jefferson, and the court now overrules and denies said motion and petition for a new trial.

The Texas & Pacific Railway Company excepts to said ruling and asks for time to prepare bill of exception and to present supercedes bond and prays that execution be further stayed. The court grants time until April 10, 1913, for parties to prepare bill of exceptions and the cause is kept open until that date and execution is stayed until that date.

The amount of supercedes bond fixed at $36,000.

GORDON RUSSELL, Judge.

Filed Feb. 27, 1913. J. R. BLADES, Clerk.

United States District Court for the Eastern District of Texas.

BILLS OF EXCEPTIONS.

In the District Court of the United States for the Eastern District of Texas, Jefferson.

W. J. ROSBOROUGH

vs.

TEXAS & PACIFIC RY. CO. ET AL.

D. L. 582.

On the trial of the above entitled and numbered cause, in this District Court of the United States for the Eastern District of Texas, at the Jefferson Division, on October 8, 9, 10 and 11, 1912, the following evidence was introduced, proceedings had and exceptions reserved, to-wit:

W. J. Rosborough, the plaintiff,, testified:

I am the plaintiff in this case. Live at Marshall, Texas, which has been my place of residence for 49 years. Am in the general mercantile business, and have been so engaged for 25 or 30 years. During that time in the course of my business I have had to do with the purchase and sale of cotton. I have bought and sold cotton since I have been in business. I have conducted a furnishing and general supply business. Have been a street and wagon cotton buyer during all the time I have bought and sold cotton. During the season of 1909-1910, I was engaged in the purchase and sale of cotton. Remember the circumstance of the fire at the Marshall Compress in 1910. The fire occurred on March 8, 1910. On the 1st of January, 1910, I had on hand several hundred bales of cotton, at least five or six hundred bales. I kept this cotton at the cotton yard of Mr. L. J. Womack in Marshall, Texas. That yard is right on the Marshall & East Texas Railroad on the south side of the town and about a mile from the Marshall Compress. I had the cotton moved from the cotton yard to the compress. Started moving it about the 1st of January, 1910. The Marshall & East Texas Railroad moved the cotton to the compress for me. The cotton was delivered to that railroad at its depot and transported by it to the compress. The understanding with the Marshall & East Texas Railroad was that the cotton was

to be stored at the compress for protection and compression and to be put in condition for sale and shipment, and that railroad was to have the shipping and handling of the cotton after it was sold. It did not make any charge for transporting the cotton from the yard to the compress, but it was understood and agreed that the Marshall & East Texas Railroad was to have the shipment of the cotton when sold. It was to have the billing out of Marshall. On the 8th of March, 1910, I had 771 bales of cotton on hand. All of this cotton, except one bale, was located at the compress. One bale was overlooked and remained at the cotton yard. 770 bales had been removed from the Womack cotton yard on the south side of town to the compress. I told the superintendent of the compress that I wanted to take the cotton from the yard to the compress. It had damaged some. I asked him if I could put the cotton at the compress for protection from the weather until I could sell it, and he said I could. After the cotton had been placed at the compress and before the fire, I had contracted to sell a portion of it to Merryfield, Zeigler & Co., a firm of cotton exporters with headquarters at Dallas. A representative of that firm came to Marshall on the morning of March 8, 1910, to see about taking up the cotton. His name was J. M. Pruitt, and he is in attendance on this court as a witness. I first saw him that morning at my place of business, and went from there to the Marshall Compress with him. I did not tarry at the compress long. I remained there long enough to show him the cotton and let him know the cotton was there. I saw Mr. McElroy, the superintendent of the compress, on that occasion. I was on the east platform and south runway of the compress. I was not on the west end of the platform that morning. I had not before that morning been at the compress before since I had sent my cotton there. I do not know exactly the length of time the compress has been in operation at Marshall, but I believe seven or eight years. The run-way I speak of is south of the main compress building. The main line of the Texas & Pacific Railway is south of the compress building. I think there are

two side-tracks south of the compress and next to the platform, and these tracks connect with the Texas & Pacific Railway. The track of the Marshall & East Texas Railway ran in on the north side of the compress building, the compress being between the side-tracks of the two railroads. The main line of the Marshall & East Texas Railway does not go to the compress and did not at the time of the fire. There is a main shed and enclosed building in which the cotton is actually compressed. and on the south side of that there is a run-way. There is a wooden platform east of the compress house; that platform on the east side is about 150 or 175 feet wide east and west, and it is about 150 feet wide north and south. The maps you show me, one prepared by Mr. Behn Cook, county surveyor, and the other by Mr. Prendergast, attorney for the Texas & Pacific Railway Company, show with fair accuracy the location of the platforms, and they both show the compress house. On the larger map the compress house is marked "House" and on the smaller map "Compress House" and in a general way both of them show the shape of the building. As I have stated, the platform on the east side of the compress house extended 150 feet east of the compress house, and nearly the same distance north and south. There was also a platform on the north side of the compress house, and one at the west end of the house. The platform east and west at the west end of the compress house was 125 or 150 feet wide, and north and south it was something like 200 feet wide. There was a platform on the north and west of the main compress building and a run-way on the south and in front of the building. During the seven or eight years before the fire that the compress was in operation I was engaged in the cotton business at Marshall. During that time the platform space on the north side of the compress house was used for conditioning cotton, and the other portions of the platform were largely used for sampling and classing cotton. The platforms were used for stacking and storing cotton. There has been cotton on those platforms every year. The run-way south of the compress building is right along by the

side of one of the side-tracks of the Texas & Pacific Railway, and is used for the purpose of loading cotton into cars. The run-way was 12 or 15 feet wide. The fire occurred on the afternoon of March 8, 1910. I first knew of the fire when I heard the alarm and some one said the fire was at the compress. I afterwards made an investigation to find my 770 bales of cotton. I found a lot of iron hoops and ashes but very little cotton. 349 of the 770 bales did not burn. 421 bales were burned. In the purchase of the cotton I kept books showing the weights of the cotton. I have the books with me. It shows the names of the men from whom each bale was purchased, the yard number of each bale and the weight of each bale and the price paid and the total amount—that is the price per pound and the price per bale. I have made a calculation to ascertain the number of pounds of cotton destroyed, and find the result to be 203,-429 pounds. This calculation is on page 51 of my cotton book. I know the reasonable cash market value of that cotton on the day it was destroyed. Such value was 14.7-10 cents per pound. I saw the burned area at the compress after the fire, and it was on the west and north of the compress building. The platform extended out beyond the compress building on the north about 50 feet, and then there was a platform on the west side of the building that extended out 125 feet. The platform on the east side of the building extended out something like 150 feet, and then on the south side of the building was a run-way 15 or 16 feet wide used for loading cotton on the cars or taking cotton off the cars of the Texas & Pacific Railroad.

Cross examined by Marshall & East Texas Railway Co.:

I had about 500 bales of cotton in the cotton yard on the 1st of January, and this was mostly an accumulation of cotton bought prior to that time. Mr. L. J. Womack controlled the cotton yard. Some of that cotton was damaged by reason of being in the yard and exposed to the weather, and I made arrangements with the compress company to have the cotton stored on its platform for protection and to prepare the same for shipment. It was to be sampled there, and

where it was damaged, the damaged part was to be taken off and the cotton compressed. Where hoops were broken off they were to be fixed. The expression "to be conditioned" means to be put in shape for shipment so we can get a clear bill of lading for it. Mr. B. C. McElroy was the manager of the compress and I made the arrangement with him. About the 1st of January I commenced to have my cotton concentrated at the compress and continued that on up to the time of the fire. The 771 bales was cotton accumulated there from the 1st of January on up to the 1st of March, or rather March 8, including the cotton taken out of Womack's yard. When I made arrangement with the compress I arranged with the Marshall & East Texas Railway Company to haul the cotton to the compress. I do not know who loaded the cotton on the cars, but I presume it was the yard men. They were Womacks yard men. Mr. Womack was cotton weigher and ran the cotton yard. The switch of the Marshall & East Texas runs just north of the compress. It is a kind of spur track. After the cotton was carried to the spur track alongside the compress, the compress people unloaded it on the platform. The 770 bales of cotton had all been transferred from Womack's yard to the compress at the time the fire occurred, and Mr. Womack so notified me on the morning of March 8th. At the time I commenced transferring the cotton to the compress I was expecting to sell it. I did not know whether I would ship the cotton or some one else would ship it, but I did know if I got the right price some one else would ship it. I did not intend to ship the cotton if I could get a satisfactory price for it at Marshall. I had sold the cotton prior to the fire and Mr. Pruitt was there taking up the cotton at the time of the fire. I mean I had an agreed sale, and Mr. Pruitt was there taking up the cotton. Under my agreement of sale I was not to ship the cotton, Mr. Pruitt was to ship it. I was not to pay anything for having the cotton conditioned. It is customary with compresses when they condition cotton to take off the damaged cotton, and the compress gets that for its services. They pick off the damaged cotton from the bales by

and and dry it out, and that then belongs to the compress; they get that for putting it in order for compression. I had no agreement to pay compress charges. I gave them the loose and damaged cotton. All the compress was to do for the loose cotton was to take it off. The manager said as soon as he had room at the compress I could send the cotton up there. Of course he wanted the compression out of it. The compression of the cotton was to be paid for, the price is fixed. If the hoops were off the cotton the compress did not necessarily have to put them on; they would attend to that when they came to compress it. I wanted the cotton at the compress so it would be out of the weather and be conditioned, and wanted it to remain there until such time as I sold it or shipped it out. There was nothing said about the time the cotton was to remain there. I asked the Marshall & East Texas Railroad to move the cotton to the compress for me.

Cross examined by the Texas & Pacific Railway:

In understood there was cotton at the compress belonging to parties other than me. There was no way of distinguishing my cotton from other cotton except by the marks. My cotton was not placed at any particular place as contradistinguished from Boyd's cotton except that part of it was in the main building. I could not give any idea at all of the amount of loose and damaged cotton the compress would get from 100 bales. Mr. Pruitt was on the extreme east end of the platform sampling the cotton. I do not think he was passing inspection, but was having it moved and getting his tags on it for the purpose of inspection. He was not sampling the cotton and determining the price then. He just took the lot at a price. I do not remember the last occasion that was at the compress prior to the morning of March 8. I don't think I had been there for some time and had no occasion to go there. All the cotton I had at the compress was carried there by the Marshall & East Texas Railroad. The last of the cotton got there the 7th or perhaps the morning of the 8th. On the morning of the 8th

Mr. Womack notified me that he was through with the transfer.

Cross examination by the Compress Company:

During the seven or eight years that the compress has been in operation at Marshall I have been a merchant and cotton buyer in the City of Marshall. When they had room at the compress, they kept the cotton under shelter and when they did not have room it was left on the open platform. It is a fact that the cotton was usually kept on the platform so that it could be classed, sampled and put in condition. They did not have room to do that work in the main building. During the seven or eight years that the compress had been doing business there that was the regular and customary way of doing the work and conducting the business. My cotton was handled in the usual and regular way by the compress. On the 1st of January, 1910, my cotton amounted to five or six hundred bales and it was then at the Womack cotton yard, and that yard is something like a mile from the compress. The balance of the 770 bales I bought in the time intervening between the first of January and th 10th of March and left it at the cotton yard until it was transferred to the compress. At the cotton yard the cotton was lying on the ground and exposed to damage. Because of the fact that it was lying on the ground and exposed to damage I requested Mr. McElroy to permit me to have it sent to the compress by the railroad so as to take it off the ground and save its being damaged in that way. I stated to Mr. McElroy that it was on the ground and I wanted it at the compress to take it off the ground and save it from deteriorating in value. I made an arrangement with the Marshall & East Texas Railway by which, without charge to me, they hauled the cotton from Womack's cotton yard to the compress. They hauled the cotton there as a matter of accommodation to me and without charge provided they hauled the cotton away when shipped. It is a fact under the rule of the Railroad Commission the Marshall Compress would get the compression of this cotton whether it accommodated me by letting me put the cotton at the com-

press or not. That compress would do the compression business of the cotton if it was compressed at all, it being the nearest compress to the cotton. They could not pass a compress but had to press the cotton at the nearest one. It was my understanding that the Marshall Compress would get the compression of the cotton in any event Mr. McElroy was to pick the damaged cotton from the bales and put the bales in merchantable shape and condition, and that included putting the bagging back over it where it was exposed. Five or six hundred bales of the cotton had accumulated at the cotton yard in 1909 and the balance of the cotton after the first of January in 1910. I think Mr. McElroy understood pretty well that he would get compression out of the cotton before it left there and I intended to throw it to him if I could. My undestanding was that under the law the cotton could not be shipped by the compress and compressed elsewhere, but that the Marshall Compress would get the work of compressing it, and this was the general custom and practice as well as my understanding of the law. I think his taking care of the cotton and conditioning it for me was a mere matter of good will and accommodation. I considered it just a business coutresy extended by one to another. I was to give Mr. McElroy the picking as before stated. There was no compensation other than what I have already told the jury. I was on the east part of the platform on the morning of the 8th, and the fire occurred the afternoon of the 8th. According to my understanding, the fire started somewhere on the west part of the platform. The burned area was west of the compress house and north of it. The east and west ends of the platform are about the same distance from the main line of the Texas & Pacific Railroad according to my recollection. Upon reflection, I believe the east end of the platform is some 10 to 20 feet nearest the main line than the west end. There may be as much as 23 feet difference in the distance.

COUNSEL AGREE THAT THE MAP to which the witness has referred in his testimony is a substantially correct representation of the compress, platform and railroad tracks

and distances, and the same was introduced in evidence. It is attached to this bill of exceptions, marked "Exhibit A" and made a part hereof.

The east end of the platform, as shown by the map, is 35.8-10 feet from the main line of the Texas & Pacific Railroad and the west end of 58 feet from the middle of the main track. I was near the east end of the platform on the morning of the fire and some of my cotton was piled there. I did not go to the west end of the platform where the other cotton was piled. The morning of the 8th the portion of my cotton on the east end of the platform was all right, and was being re-weighed and set out. It had been put in condition. Some of it, of course, was not damaged at all, and the portion that was damaged had been put in condition. It struck me that the compress people were doing the proper and customary thing about my cotton on the east end of the platform. Mr. McElroy was there about the compress that morning giving the business of the concern his personal attention. They had and kept about the compress and platform fire hydrants and barrels and buckets and water for the purpose of extinguishing fire, and to enable them to get a cheap rate of insurance. That is done at the demand of the insurance people and to provide against danger from fire. From my observation, the cotton belonging to me and stored on the east end of the platform was being handled in a proper way by the compress, and my natural conclusion would be that the compress was properly handling and caring for my cotton on the west end of the platform and further away from the railroad track. It was my belief and opinion that the compress was acting properly in regard to me and my interests. Mr. McElroy was engaged in having the cotton put in condition in order to enable me to carry out my agreed sale. They were doing that for my interest and also because I had requested Mr. McElroy to do it. I had instructed him to do the very thing he was doing with my cotton, and in my judgment he was doing it in a proper way and carrying out my instructions. Four or five days before the fire I had told Mr. McElroy that I had agreed to sell the

cotton and instructed him to put it in condition. I had given him those specific instructions in regard to the matter.

Re-Cross examination by Marshall & East Texas Railroad:

The cotton was not to be compressed until I made a sale and it was ready to go out. I had nothing to do with the compressing and had nothing to say as to whether it would be compressed or not. I gave no instructions with reference to that. I agreed with the Marshall & East Texas Railroad to give them the haul when the cotton was shipped out to get them to transfer it from the yard to the compress. I had no agreement with the railroad that if it was not shipped over their road they were to have switching charges. I did not know who I would sell the cotton to. I knew I would be able to control the matter of what road the cotton was shipped over because I knew when I sold it it would be with the understanding that the Marshall & East Texas should have the haul, and protect my word to that extent. I had not given any instructions as to where it would be shipped. I did not know whether at that time I would ship it myself or some one else would ship it.

Re-direct examination:

I thought the cotton was far enough from the railroad to be safe from fire. There was cotton being handled which was nearer the railroad. I stated I had an agreed sale of the cotton. 280 bales had been received by Mr. Pruitt at the time of the fire. The weights of the cotton taken up approximately tallied with the purchase weights at the yard.

J. M. Pruitt testified for plaintiff:

Live in Dallas and have lived in Texas all my life. In the early part of 1910 I was in the cotton business and working for the firm of Merryfield, Zeigler & Co. I have been in the cotton business since 1889. I remember going to Marshall about the 8th of March, 1910, to take up some cotton that was under contract. I do not remember exactly the day of the month I got to Marshall, but it was early in

the month. I left Houston in the afternoon along about six o'clock and believe I got to Marshall between midnight and day. I saw the plaintiff at the compress the next morning. It was his cotton I had under agreement. I was there to receive some cotton from him. The agent of our firm called me up and gave me information as to the conditions of the deal with plaintiff, and I went to the compress supposing he would be there, and he was there and I was introduced to him. My mind is not exactly clear whether I made the arrangements about weighing the cotton or the firm made it with the public weigher, the man that run the cotton yard to weigh the cotton at a stipulated price. As the cotton was put on the east end of the platform the weigher weighed it, and as he weighed it I put one of our tags on it and entered it on our book. I do not remember at what number I started, 100 or 1 and run on numerically. I remember seeing some trains passing there going west. A passenger train first attracted my attention; at that time I was waiting for more cotton, and I stepped over to the other side of the platform, which would be the south side. One thing that attracted my attention to this train was the first that a switch engine was pushing behind it, and another thing was the throwing of cinders down on me as the train passed. The cinders came down on me in sufficient quantities to make them a bit uncomfortable from the fact that it felt like they might go down my collar. I jerked up my shoulders and tucked my head down to protect myself. Afterwards another train passed. It was a freight train. I was at about the same spot as when the passenger train passed, and I was there because when the first train passed I realized it was dangerous and fire might break out. I spoke to the superintendent about it. When the second train passed the cinders fell all over me and around on the platform. The cinders were of various sizes. I suppose they would run from very small—something like a pin-head—up to the size of the end of my thumb or something like that. I mean the size from the first joint of my thumb to the end. That is the only way I know to describe their size. As the

switch engine got about opposite to where I was standing it began to whistle and some one holloaed fire, and I looked down and saw the smoke and I ran down to where the smoke was. I believe it was the superintendent of the compress who holloaed "fire." The fire was on the west end of the platform, I believe, although I am not sure of the points of the compass there. I had weighed between two and three hundred bales of cotton before the fire. I have been in the cotton business since 1889, classifying and receiving cotton during that time. None of the cotton I had weighed was burned, it being on the east end of the platform. None of the Rosborough cotton that was burned had been received by me.

Cross examination: By Texas & Pacific Ry. Co.:

I was alarmed for the situation because of the cinders falling on the platform. I could see the cinders after they hit the platform or my clothing. I do not think my alarm as to the danger causes me to magnify the size of the cinders. I was not excited at all. I was alarmed for the situation from the fact that I have been on railroad trains and seen them set grass and stuff of that kind on fire. I never saw a cinder come through a smoke-stack as big as the end of a pencil or any other size, but I have seen cinders as large as that and larger that came out of a locomotive. I do not know that I could tell you exactly where I saw them, but I have seen them at various times. I have noticed cinders that came from a locomotive much larger than that. I saw cinders on the platform much larger than the end of a lead-pencil. Some of them I saw were as much as a half inch wide, I would say. I do not know that you would call a cinder that size a coal. Don't know what you would call it. If a cinder that size was red-hot, it would set fire to most anything. Between the passing of the passenger train and the coming of the freight, I was conscious of the danger to the cotton, and this was a period of about 15 minutes. I could not say whether the cinders I first observed came from the engine pulling the passenger train or the switch engine pushing it. The passenger train was a pretty long

one, perhaps 100 yards long. It is not clear in my mind whether the cinders came from the passenger engine or the switch engine. I just remember the cinders falling on me. I could not say whether the cinders that fell while the freight train was passing came from its engine or the switch engine pushing it. I suppose they came from the engine ahead, the one pulling and not the one pushing. When I first noticed the fire I saw the smoke and not the blaze. I did not see the smoke before the alarm from the switch engine. The alarm from the switch engine is what called my attention to the fire. When the alarm was given the switch engine was not opposite where I stood on the east end of the platform and had passed the place of the fire which was at the west end of the platform. I presume the fire was some 15 or 20 feet from the south edge of the platform, but I paid no special attention to that. The fire was right close to what I call the west end of the platform. It was on the opposite end of the platform from where I was. The platform had a little extension or tongue at both ends that extended a little further than the platform proper. The fire started near what is shown as the coal house on the plat drawn by Mr. Prendergast, at the place marked D on said plat. The fire started 5 or 6 or 7 feet from the coal house. I mark on the platform the place where I stood as A. I would say it was 40 or 50 feet from where the fire started to the extreme edge of the platform. My recollection is that the fire started 16 or 17 feet from the south edge of the platform. I remember a man from McKinney, and I presume it was Mr. Merritt, coming to me for a statement. He came to me as the representative of the Texas & Pacific Railway Company and asked me some questions. The statement you show me purports to be based on information obtained from me by Mr. Merritt January 8, 1912, at my residence, 4108 Elm St., Dallas. You present me the statement and I have read a portion of it, but I don't believe there is any use of my reading it through, for there are a good many things in the statement that I do not say. He did not take it down in shorthand or anything of the kind. I treated him cour-

teously but told him I did not want to sign anything. He did not have anything for me to sign. He asked if I would make a signed statement and I told him no, that I might be at court some time and would tell the court what I knew. I did not talk to the gentleman much about the matter, but gave him to understand in a courteous way that I did not care to make a statement. He did not ask me many questions about it. If you would rather, I will finish reading the statement. I have finished reading the statement. To tell the truth, I dont remember just what I told Mr. Merritt. I don't remember whether he asked me how far the fire started from the south side of the platform. He did not ask me many questions. I was rather noncommital in the matter. He told me he represented the railroad. I did not know at that time they were trying to fasten the fault on the railroad. I supposed the matter would come up in court at the proper time and I would tell anything I knew. I would have refused to tell anybody what I knew about it because there was nothing compulsory about it. I think I refused to tell the plaintiff about it. I have not told the plaintiff what my testimony would be. I had a little talk in Dallas two or three weeks ago. Gen. Crane and Mr. Jones sent for me and asked if I could come down here as a witness. I did not tell the plaintiff nor the insurance companies or their representatives what my testimony would be. I did not tell anybody what I would go on the stand and swear. I talked a little with Mr. Merritt about the matter. My mind is not clear as to whether I told Mr. Merritt the distance from the south margin of the platform to the place where the fire started. I always spoke of that side of the wharf outside of the building as the west end of the platform. The fire started five or six or may be ten feet from the west end of the coal shed, and it might have been 15 or 20 feet from the west edge of the platform. I just have to guess at those things for I made no measurements. Mr. McElroy was with me when I first saw the smoke. We went out there just before the train came along, the freight train, and as the train passed along the whistle attracted

our attention, and we went down there and began to fight the fire. I suppose the fire started in the row that came out just about the end of the coal shed, because that is where the fire was when I got there. It had gone down some thirty or forty feet when I got there. I don't know whether the fire started in the first or second bale; it might have burned both ways. The fire spread in either direction and around there. The west end of the building caught fire from the cotton. I could not say how long it was after the fire started that the building caught fire. I saw some cotton there with the heads of the bales exposed. Thirty or forty bales of cotton with the heads exposed were northwest of the west end of the platform, or rather the coal shed, at the point marked K on the map prepared by Mr. Prendergast and hereto attached marked "Exhibit B" and made a part of this bill of exceptions. I noticed loose cotton around on the platform north of the compress building, and there was a little loose cotton northwest of the building. There was considerable loose cotton scattered around where they were picking the bales. I did not call Mr. McElroy's attention to the loose cotton before the fire. I did not ask him why he did not clean it up. I asked him early in the morning if he was conditioning the cotton and getting it in shape and he showed me where he was doing the conditioning. My recollection is that there was some space between the cotton and the south edge of the platform, and that it was not stored to the south edge. I believe there was 15 or 20 feet between the cotton and the south edge of the platform. To the best of my judgment, it was 15 or 20 feet from the place where the fire started to the south edge of the platform. I could not say exactly in what bale the fire started, but my judgment is that it caught in the end bale, the one nearest the south edge of the platform. I did not notice any loose cotton about that place. The only cotton that I was to take up that I saw was that on the east end of he platform. I was at the west end of the platform early in the morning. My work was on the east side of the platform all the morning. I do not remember seeing any cotton with the bagging

off the ends near where the fire started. Near the center of the platform I say some cotton with the heads wet and damaged, and they took the first hoop off and let it dry. I don't think I stated to Mr. Merritt that I say bales of cotton with the ends uncovered near the place of the fire. I did not tell him any particular location, and he did not ask me for any particular location that I remember of. I saw some negroes around there attending to the loose cotton, some 20 or 30 I suppose. They were on the north and northwest side of the platform. If the cotton was damaged they would take the hoops off and pull the damaged cotton off. My recollection is that the fire spread rapidly from where it began clear to the north edge of the platform, and I believe there were bales of cotton all the way. It is my recollection that it was some 15 or 20 minutes after the passenger train had gone west that I discovered the fire. I came to the conclusion that the grade along there was pretty steep because the switch engine had to push the trains out, and the engines seemed to labor. You can look at the track and tell it is up grade going west. I would suppose an engine would throw more fire going up grade than on a level track. I would not pretend to say whether it was the passenger engine or the switch engine throwing the cinders. The passenger train was a long one, had probably 10 cars. I believe the wind was from the south. I could not say whether the fire was caused to spread more rapidly on account of the large amount of loose cotton around there. The fire was under good head-way when I got there, the wind was blowing and it went from one bale to another. The fire was not clear across the platform when I got there. I had to go about 200 feet to get to the fire after I saw the smoke. The fire when I got there was in the bales of cotton, but of course if it got in the lose cotton that would cause it to spread faster. I saw the loose cotton scattered on the platform and the bales and all burn. I saw a cotton fire a short time before that at Belton. I know that cotton usually burns very fast. I don't know whether loose cotton would burn faster than baled catton or not. I know a pressed bale

of cotton would be hard to burn. Cotton not pressed will flash from one bale to another almost like powder. Cotton without bagging on it will burn faster than cotton with bagging on it. I know it takes longer for baled cotton to burn up than loose cotton. Mr. Edwards, a man representing the insurance companies came to see me. He came to me with a statement and said he would like for me to sign it, and I told him I would write him one and I wrote out a short statement and signed it. I expected there would be litigation about the matter at the time. I do not remember what that statement contained, but I would recognize it if I were to see it. There are a great many things I could not tell exactly about because it has been two years since the fire. I gave the statement to Mr. Edwards a day or two after the fire. I have not seen it since that time. I had few minutes conversation with Mr. Crane. He sent for me and asked me a few questions and I answered them, and told him I would come over here to court. Mr. Jones was present at the time I talked to Mr. Crane, and I suppose was there as the attorney for the plaintiff. I did not make a statement to Mr. Jones but he was present when I talked to Mr. Crane. There was no law to make me sign a statement for Mr. Merritt. If I had to tell it, I thought the proper place was before the jury. There was no law to make me come to Jefferson to court. I came here from Shawnee, Okla. I am a cotton buyer there. I am still a cotton buyer for exporters, but on a little different basis. I left Shawnee Saturday night, spent Sunday in Dallas, and left there for Jefferson Sunday night at 9 o'clock. I made the statement to Mr. Crane some two or three weeks ago. I had been operating in South Texas and same through Dallas and Mr. Crane sent for me. I have never called for the written statemnt I gave Mr. Edwards or asked to see it. Anything I said in the statement was while I was on the ground and while the matter was fresh in my memory and ought to be accurate. I did not sign the statement prepared by Mr. Edwards because a man might want to express the same thing in different language. I could not state any sentence Edwards used in his state-

ment that did not express my right meaning. I do not remember that I gave Mr. Merritt any reason why I would not sign any statement for him further than I just did not want to sign a statement. I do not remember going into details with him, but just told him I did not want to sign a statement. I gave him a cigar and treated him as courteously as I could. I don't know that Mr. Merritt got what I knew about the matter. I talked a little about the fire but evaded his questions. He did not insist on the statement after I told him I did not care to give one. He did not go into a great long argument about the matter. He asked me about it and talked a little about it, and I told him I did not care to sign any paper, that I had refused to sign several.

Cross examination by the Compress Company:

I was having the cotton weighed on the morning of March 8, and my particular work was on the east end of the platform. I was weighing and sampling about 200 bales of cotton on the east end of the platform. I had not sampled and weighed the cotton on the west end of the platform at the time of the fire. There was no loose cotton scattered about the east end of the platform that I remember. The samples had been taken out, rolled up and put in sacks. North and northwest of the compress house is where the cotton was being conditioned that day and there was some directly west of the center of the building being conditioned, and at those places is where I saw the loose cotton on the platform. The principal part of the loose cotton was north of the compress building proper. I saw the smoke of the fire about the west and north end of the coal shed, rather at the southwest corner of the coal shed something like 15 or 20 feet from the south edge of the platform. I think there was a little space between the coal shed and the compress building. If there was any loose cotton in the vicinity where I first observed the fire, I have no recollection of it. The loose cotton was north and northwest of where the fire started. I could not say whether the fire started in loose cotton. The fire was in bales of cotton when I got there. There was no loose cotton around where the fire started as

far as I observed. I have been around compresses a great deal during my experience of 23 years in the cotton business. There are not many compresses that have walls built around the compress building as this one had. Most of them have open sheds and platforms. In that enclosed shed was where the actual compressing took place. All compresses throughout the country have open platforms on which cotton is placed as it accumulates. There was nothing about the placing of the cotton on the platform or the manner in which it was handled that impressed me as being unusual or improper or different from the manner in which cotton is ordinarily handled at compresses throughout the country.

Re-Cross examination by Texas & Pacific Railway Co.:

After the passenger train passed I called Mr. McElroy's attention to the fact that I considered the situation dangerous. When I saw the other train coming, I told him to come over there and I would show him. The showering of the sparks made it dangerous. Any kind of cotton exposed to sparks is in a dangerous situation. I would suppose the loose cotton would increase the danger. If loose cotton was where sparks would fall on it, that would increase the danger I should think loose cotton would be more apt to catch fire than baled cotton, especially if it was spread all over the platform. If it was not spread over the platform, any loose cotton and exposure to sparks would make it more dangerous. Outside of the compress proper, there was no shed for the cotton; it was on the open platform.

Re-direct examination:

I have stated that the sparks or some of them, the cinders properly speaking, were about the size of the end of my thumb, and my thumb measures an inch across. To be exact, it is 15-16 of an inch.

Re-direct examination by Texas & Pacific Railway Co.

I would not think I saw cinders come out an inch in diameter. It is hard to describe those things. I think I saw

them a half inch in diameter. I would not swear I saw any a quarter of an inch in diameter, but there might have been one an inch. There is no accurate way to tell the size of them. To the best of my knowledge, I would say that some of them were a quarter to a half inch across. I could not swear that any of them were a quarter of an inch or an inch, but that is the way they appeared to me. I can only describe them as I saw them. I give my judgment about it as it looked to me. They just looked to be as large as the end of my thumb.

Re-cross examination by the Compress Company:

I did call Mr. McElroy's attention to the danger from the showering of the sparks. We had a few words about it and I told him another train was coming and we went over to the edge of the platform on the east side, and the freight train came along and the fire broke out. While we were observing the situation the fire broke out near the west end.

Cross examination by the Insurance Companies:

When Mr. Edwards went there in behalf of the insurance companies I refused to answer his questions or sign his paper. I took a scratch pad and wrote a half dozen lines or something like that, I could not say just how many. I wrote a little something and signed it. I am pretty sure I signed it.

Plaintiff rests.

Marshall & East Texas Railway Company rests.

W. J. Rosborough, being re-called by the Texas & Pacific Railway Co., testified:

I had insurance policies on the cotton, and was paid a portion of the insurance. I collected $17,000.00 from the insurance companies. I am not claiming for that amount. I am suing for the balance of my claim after deducting the amount of insurance paid. I am claiming the rest of the $29,000.00. The money was paid me by the insurance companies in December, 1911. They paid me after this suit was

filed. None of the companies but the Home had paid me when I filed suit. Before I sued I had a controversy with the insurance companies and had collected some of my claim.

Cross examination by the Insurance Companies:

I have assigned to the insurance companies an interest in this litigation equivalent to the amount paid me. The assignments were made in writing and signed and acknowledged by me. That applies to all the companies which have filed a plea in intervention, and whose names were read yesterday, and that plea shows the amounts. All the assignments were made after the suit was filed except the one to the Home Insurance Company for a thousand dollars. The Home had paid me and I made an assignment to it before the institution of this suit. They claimed they were entitled to the assignment of the claims because of the conditions of the policy contracts. They claimed that under the contracts I was required to make the assignments.

Cross examination by the Marshall & East Texas Railway Company:

I do not know whether Mr. Jones, my attorney, made a claim against the Marshall & East Texas Ry Co. prior to the institution of this suit or not. I could not say.

Cross examination by plaintiff:

Do not remember the date I placed my claim in the hands of attorneys, but it was possibly 60 days after the fire. There was something said about the liability of the Texas & Pacific. I have never at any time waived my claim against the Texas & Pacific. I entrusted my claim to Mr. Jones, my attorney, and relied on him to look after it for me.

Re-direct examination by Texas & Pacific Railway Co.:

Seventeen thousand dollars of my claim I collected from the insurance companies and twelve thousand I did not.

Kittie White, a witness for the Texas & Pacific Railway Company, testified:

At the time of the fire at the Marshall Compress I was setting on the gallery of my house west of the platform. I live right in a little alley, and my house fronts the compress. There is no house between my house and the compress right in front of my house. There is a garden between my house and the compress. I saw the fire when the engine gave the alarm; two bales of cotton were then burning that I could see. They were what I call big-head bales. A big head bale is one where the hoop has slackened and the cotton got loose and bulged out and is uncovered. The bagging would be torn on the end which left the cotton uncovered. When I saw the blaze it was right on the two big headed bales. Those bales were right at the west edge of the platform, and about twelve feet from the south edge of the platform next to the railroad. I was not working at the compress then; I had been sick and was at home. The fire burned very fast. I noticed but three big-headed bales on that east end of the platform. Those three bales had been there two or three days before the fire. I did not see any persons at work on the platform. When I saw the fire I halloaed for Ben Beasley and Mr. McElroy. Beasley is a man that works on the platform. They did not hear me and I told my little grandchild, Alice, to run over there and tell them the compress was on fire. By the time she got over there they were all out on the platform.

Cross examination by the Compress Company:

I live northwest of the compress building and platform. My house was between the Texas & Pacific and the Marshall & East Texas Railroads. There were two houses fronting south on the T. & P. but they were not between my house and the compress; they were rather to the south of a line from my house to the compress, but nearer the compress than my house. I suppose it was two hundred yards from my house to the bale of cotton that first caught fire, but I am not very good at telling distances. The switch engine blowing the whistle first attracted my attention to the fire. and the engine was towards Marshall from my house. I

looked and saw the fire. The bale of cotton that was on fire was something like 12 feet from the south edge of the platform. The two bales that I saw burning at first were near each other, next to each other or touching each other. There was a little corner of the platform that sticks out there and the cotton was rolled up to that, but on the platform proper. The two bales of cotton where the fire started were standing on their ends and the big heads turned up on the compress platform near the southwest corner about 40 feet from the compress building and about 12 feet from the south side of the platform. I could sit on my gallery and look into the door of the compress building. My house was on ground lower than the platform. There were three steps from the ground to my gallery, which would be about two feet as near as I can get at it. I worked about the platform a good deal picking damaged cotton from bales and picking up loose cotton. The two bales of cotton were afire at their corners furthest from me. The blaze on each bale covered about a foot square in my judgment or may be 18 inches. I saw the three bales of cotton with the big heads in passing there before the fire and when the fire broke out I saw it was the same three bales I had previously observed in passing there. I noticed a large space was exposed at the end of each of the bales. The exposed places on the three bales was about as big as my head. The west part of the platform was covered with bales of cotton, but I don't know how maney bales were there. I worked about the platform nearly all the time. It was a common thing for cotton to be on the platform; that was what it was for.

Cross examination by plaintiff:

There was cotton between me and the bale that first caught fire, but I could not say how much. There was a lot of cotton on the end of the platform next to my house. I don't have any idea how many rows of bales were on the west end of the platform next to my house, but I do know there was a whole lot of them. The fire broke out beyond the coal house from my house. The fire broke out about the

same distance from my house as the corner of the coal house was. I believe where the fire broke out was nearer my house than the corner of the coal house. The bales that caught were about 12 feet from the corner of the coal house. There was no cotton between the bales on fire and the coal house. The space between them and the coal house was open. I saw the Texas & Pacific passenger train as it passed that evening. The passenger was going away from Marshall, and I suppose had gotten about a mile from the compress when the fire started. The switch engine was about even with the fire when it began to whistle. The freight engine had passed the compress at the time the fire started. The freight engine was puffing and blowing when it passed the compress. I did not see any fire but saw cinders thrown high enough to attract my attention. The fireman was shoveling in coal along by the compress, and that made more cinders I presume. I looked and saw the fireman shoveling in coal as they passed the platform. I first holloaed for Beasley and Mr. McElroy and did not see either one of them, and I halloed fire and sent Alice over there to tell them the compress was afire. Some of the cinders from the freight engine fell in my yard. I had hung up some clothes in the yard and after the freight passed had to take them down and rinse them over on account of the cinders.

Re-cross examination by the Compress Company:

The bales next to the coal house first caught fire. The coal house is joined to the main building where the machinery is. It is 50 or 60 feet from the coal house to the corner of the platform.

Re-direct examination:

I said my house was lower than the ground where the platform was. It is down hill from my house to the depot, and the compress is between my house and the depot. The dirt between my house and the platform is not as high as the platform. Next to my house the dirt is four and a half or five feet lower than the platform. The three bales of

cotton with the big heads where the fire started were about 15 feet from the side-track south of the platform.

Lizzie Johnson testified for defendant Texas & Pacific Railway Company:

Kittie White is my mother. I remember the fire at the compress in Marshall. I saw the fire. I lived right in front of the compress door. I heard the whistle blowing but could not see the fire. I was on the ground at the front of the house. My mother, Kittie White, said fire and I ran in the yard, and when I got from behind the house I could see the fire. When I got where I could see the fire it looked like it was burning on three bales of cotton. I had not noticed those bales before the fire. My mother spoke to me three or four or two or three days before the fire of the condition of those three bales. After my mother spoke of the bales I looked at them, and they were sitting on their ends with loose bagging on the ends of them with the cotton sticking out. They were what I call big-head bales. The bagging looked to be slipped at the ends of the bales and the cotton was exposed. The fire was on those bales when I first saw it. I could not tell how many rows of bales were between the fire and the west edge of the platform. The bales where the fire started were 15 or 20 feet from the south edge of the platform. I had worked at the compress the summer before the fire.

Cross examination by the Compress Company:

The bagging had come loose on account of the ties slipping and left some of the cotton exposed on the ends or corners of the three bales. I was with my mother at the time of the fire; she lived with me. There is two lots and an alley between my house and the compress. I guess it was 140 or 150 yards from house to the compress. I know where the coal house is that is attached to the main compress building ing. It was 30 or 40 feet from the place where the cotton caught fire to the corner of the coal house, and about the same distance from the southwest corner of the platform. There was a great deal of cotton between the three bales

that caught and the west edge of the platform, but I could not say how much. The ground where my house set was lower than the ground the compress was on, and I had to look up hill to see the cotton. My gallery was about two feet above the ground. The compress platform is about as high as a man's shoulder standing by it. To see the burning cotton from my house I had to look up hill to the compress and then look over the intervening cotton to see the burning cotton.

Cross examination by plaintiff:

The first thing that attracted my attention to the fire was the whistle of the switch engine. That was before my daughter went over there.

Re-direct examination:

It is down hill from my house to the depot in Marshall, and the compress platform is between my house and the depot. I guess it must be a little down hill from my house to the compress. There is a hill back of my house near Sloan's lumber yard, and I am between the top of the hill and the compress. The Sloan yard is on higher ground than my house.

B. King, a witness for the Texas & Pacific Railway Company, testified:

I am inspector in the Texas & Pacific round house at Marshall, and have been for six years. Was inspector there in March, 1910. I recollect the occasion of the fire at the compress in March, 1910. I did not hear of it until the compress had burned. I heard the next day that the compress had burned. I heard that engine 359 and 140 set the fire or were claimed to have set it. I inspected 359 on the 7th and 10th of March. The engine had been in the shops for repairs before the 7th. It came out of the shops on March 4. I do not know exectly when it went in. I know they put a new spark arrester in her at that time. I inspected her on March 7th to see if everything was all right and put back in proper shape. The engine went into regular service after

being in the shop on March 8. She made a trial trip, which is customary after an engine has been repaired to break it in and keep it from running hot. I think I next examined the engine on the 10th. I then found the front end filled with cinders, and it would not make the time is how came me to inspect it. I got a message that the engine did not make steam enough to handle the train and I opened the front end and found the engine was not cleaning herself and choked up. There is a wire netting in the front end of the engine that prevents the escape of large cinders. The netting, sample of which you show me, is the kind used by the Texas & Pacific Railway. It is called standard netting. It has three by three and a half meshes to the inch, and it is No. 11, 1-8 inch wire. Engine 140 was a switch engine. I inspected that engine on March 12. I found the spark arrester of 140 in good shape, first class condition. It had the same kind of spark arrester as the piece you show me. The exhaust carries the sparks up the smoke stack. It does not push them up, but draws them up. Any spark or cinder that comes out of the engine has to go through the netting. There is no other way for them to get out unless the netting is broken.

Cross examination by plaintiff:

The reason I remember the engine was inspected on March 4th is the fact that every engine that goes out on the road or comes into the round house I open and examine. I do that every time an engine makes a trip. It was my duty to inspect the engines and spark arresters every time they came into the round house. We start no engine out of the round house going west without first inspecting the spark arrester. We inspect every engine that goes out of the round house either east or west. I never let an engine at any time go out of the round house that would permit a cinder larger than the holes in the netting to go through the smokestack. If a cinder escaped larger than the holes in the netting, the spark arrester would be defective, and an inspection would reveal that defect. The freight engine did

not go out of my shop and I had nothing to do with it. The freight engine went out of Longview. The freight engine that passed Marshall the afternoon of the fire run from Texarkana to Longview, and did not come out of the round house at Marshall. Marshall was the end of a division for engine 359. I do not know exactly the width of the hole between the wires in the spark arrester. It is a little larger one way than the other. It is a 2x2½ mesh. The piece of netting here before the jury has never been in an engine. It was cut from a new netting. The engines have a front end door, and the inspector opens that and takes a torch and goes inside and uses a torch in making the inspection. It is a circular door fastened with bolts and lugs. The front end of an engine extends some four or five feet beyond the end of the boiler, and there is no water in that four or five feet. The boiler proper is back towards the engineer. The spark arrester is placed in the open space between the flues and the opening where the smoke stack opens up. It separates the smoke stack opening from the flue opening. The smoke stack opening is right at the front end. The exhaust pulls the sparks through the netting. The exhaust from the cylinders into the smoke stack draws the air out of the smoke stack. The screen is diagonal in shape across the front end of the boiler extension and the smoke stack is back there towards the engineer. The smoke stack is about even with the bottom end of the screen or a little further back than the bottom end of the screen and then the screen extends diagonally to the fire box. The screen sets at an angle of about 45 degrees. I had nothing to do with the freight engine. If the spark arrester was in first class condition, the engine would not throw sparks or cinders larger than the openings in the netting. It would not throw them larger than the openings if it was in condition to run on the road having respect for the property of people along the road. The same kind of netting was used on all engines on the road, and is a standard netting. I have been inspector in the Marshall round house for six years.

F. E. Rodiek testified for the Texas & Pacific Ry. Co.:

I am a boilermaker in the employ of the defendant at Longview and have worked there in the round house six years; was there in March, 1910. My duty is and was to inspect engines and see that they are fire-proof, and do necessary work on them. I had to inspect and do the work both. I remember inspecting engine 202, which was a local freight engine running from Texarkana to Longview. This engine came into Longview from the east on March 8. I received a message from Marshall which caused me to make a special inspection of that engine; I was told to make an inspection of the engine on account of the compress burning at Marshall. After they got the fire out of it and put it in the round house I inspected it. I found the appliances in good condition. I opened the front end and found the spark arrester in good condition. It had the standard netting used by the Texas & Pacific Railway since I have been there. The meshes were 2x2½ to the square inch. I found nothing wrong with the netting. I don't know anything about the passenger engine. There is an outside circular door that I opened up, and then there is the spark arrester that comes straight up and down. It is right in front of you. It slopes. There is another door on engine 202 that is called a trap door and that is the netting; the netting is the trap door. It is bolted on at the top and at the bottom it has hinges.

Cross examined by plaintiff:

That is not a bolt, but rather what you would call a lug. The lug is fastened to the stationary part of the engine. The lug will turn around and the door drop. The lug is bolted to the boiler, and the door is held up by a key. There is a hole in the spark arrester that fits through a stationary bolt and then there is a key that slips through the end of the bolt and that holds the door up. You take that key out and the door comes down. That door is of netting and has a frame that the netting bolts on. That door is four by five feet one way and three feet up and down. The smoke box of engine 202 is about five feet in diameter. The netting covers that entire space with the exception of a portion at

the bottom. Half of it is covered with netting. The upper part of the netting is something near the center of the smoke box. It comes down to the center and extends entirely across and up so as to completely screen the front end of the engine so that any sparks or cinders that can get out of the smokestack if the netting is in place must go through the netting. I took the netting down to see if it fitted close up and no holes were broken or worn in it. I took the key out and let the netting down and went back in there and looked at the sheet iron which is a solid plate called a deflector. I made that inspection in the round house at Longview. The negro cleaned the fire and I was there when he drew the fire. It was an hour or so after the engine came into the round house that I made the inspection. I had to give the engine time to cool off. I guess it took me about an hour to make the inspection. I inspect all engines coming in. Regardless of whether I have inspection instructions, I inspect all engines coming in. I found the engine No. 202 in good condition and did not report it for repairs. I inspected engines that came in and went out of the round house for two weeks before the fire and two weeks after the fire while I was on duty. I made inspections of all of them when they came in. I don't know that I found any engine with a spark arrester which was defective a few days before the fire. I have no recollection of having found any, and could not tell unless I had my inspection book. The inspection book is here, but I have not noticed to see about that. I have inspected all engines coming in there while I was on duty since I have been there. There are two men working in the day time and I work at night. There is a man on duty all the time to inspect engines. I dont think I reported any engine with a defective spark arrester within two weeks after the fire, but could not say for certain unless I had my inspection book. The book would show if I did. If the netting in 202 was in proper shape it would not permit cinders as large as an ordinary man's little finger to escape. I don't think a cinder that large would be burning. I don't believe it would be alive, but if it was it would be dangerous to prop-

erty. I think live cinders do come through smoke stacks. I don't think a live cinder would come through a netting that is in good shape. I don't believe it is possible for a cinder to get through a spark arrester that is in good shape and travel a distance of sixty or eighty feet and set anything afire. The cinder would go so high from the exhaust of the engine that by the time it got down it would be dead. If an engine set fire to anything that was as much as sixty feet from the track, I would think there was something the matter with the spark arrester. I don't believe an engine with the spark arrester in good condition would set fire to anything sixty feet from the track. I am a boilermaker and do not know anything about the operation of an engine or the effect of improper operation. If the fire in the engine is stirred, it will naturally loosen up the cinders and cause more to come through the smoke stack. I have never lived in the country and never burned logs. The exhaust pipe of an engine is in the smoke stack.

Re-direct examination:

I found cinders in the front end of 202 and that demonstrated the fact that she was not cleaning herself, was not throwing the cinders out. There was a barrel or two of cinders in the front end.

M. W. Stokes, a witness for defendant Texas & Pacific Railway Company:

I am now and was in March, 1910, foreman of the boiler shops of the Texas & Pacific Railway Company in Marshall. The inspection and repair of engines came under my jurisdiction. I kept a record of repairs. I remember hearing of the compress fire at Marshall. I heard what engine it was claimed started the fire. The man that told me about the compress fire the next day told me they claimed engine 359 set the fire. That was a passenger engine. I made an inspection of the engine after that, and the round house inspector King was present. I did not see Pearsall examine the engine at all. I find from my book that engine 359 was taken into what we call the erecting shop on February

12, 1910, for a general overhauling. We applied 6 ordinary stay bolts and 4 Tate stay bolts and applied 4 rails—the proper name is radial stays, put on a new smoke stack, 270 new flues, and put in a new front end and the engine was completed and turned out of the shops March 4, 1910. The common practice is that in turning an engine out of the shops it is first fired up and we blow out the boilers so that the water will not foam, and then the engine is fired up again and taken out in the yards and sometimes only in the yards for the first trial, and when they have it in serviceable condition and all parts adjusted they generally run to Longview or Texarkana on a freight train for a trial trip. It was reported to me that the engine went out on the first passenger run on March 8th. When I examined the engine after the fire it was in good condition in every respect as far as I could tell. That examination was made after I learned of the fire and what engine was said to have started it. All I know about the condition of engine 140 on March 8, 1910, is from the record that my inspector keeps in the round house. It would not be on this book. This is my personal record of work on the engines when they come into the shops. When an engine is overhauled I make a charge for the work. I charge the material and show what work was done. These items are the basis of my charge.

Cross examination by plaintiff:

My book would not contain a record of ordinary running repairs. I do not know how many trains went out of Marshall going west in the twenty-fours hours immediately preceding the fire. I have no way of knowing unless I inquired. There must have been quite a number of them. I believe three freight trains with regular runs come to the Marshall round house. We do not keep extra engines for extra runs, but we might take an engine from a regular run for an extra run in an emergency. Barring the three engines, the freight service is from Texarkana to Longview. The freight engines that run out of Marshall are on the Denver run going west and the meat run going east, just the two

runs. They are fast trains. The front end of an engine is made up of the diaphragm plate, the draft plate and the netting, and that means the whole inside rigging of the front end. That comes under my jurisdiction, but I don't have anything to do with the steam pipes. I have to do with the spark arresting appliances. This book shows nothing in reference to engine 202. I have not looked up to see when engine 202 was last in the shops before the fire. This book begins January 6, 1908, and covers the period up to the time of the fire. My book is not paged. I presume we put a new netting in engine 359 because of the near approach to wearing out of the old one. We have to take the netting out to do the work, and it is very seldom that the old netting can be taken out and put back without being damaged, especially if it is damaged to some extent. The wires become worn by the cinders going through them. The time it takes a netting to wear out depends a great deal on the class of engine. With an ordinary engine in the regular service of the road the netting will last a year any way, and sometimes they will last two years, and if a freight and passenger engine are of the same capacity, the nettings will last about the same length of time. The netting in the larger engines will last longer than in the smaller ones. If the engines are used for a certain period without the netting being replaced, the wires will break and make holes in the netting. We put in more netting in the round house than in the big shops at Marshall. On the road engines that do not run into the Marshall shops the nettings are supplied at the terminals, such as Texarkana and Longview or Fort Worth. It is necessary to replace the nettings once a year or oftener or not so often owing to circumstances. When I speak of netting I mean the wire screen such as the sample before the jury. We use that same kind of netting in all our engines. You could not say that all the nettings are put in in exactly the same way. Very often the netting is in one piece and sometimes it is in two pieces. Sometimes the netting is put in in two pieces and bolted together. The netting is shaped, cut and put in at Marshall when we put them in. Wherever

they are put in they are cut, shaped and inserted in the engine. We take a measurement of the size of the boiler and cut the netting the proper size. In some of the engines we have to have two widths of netting, or more than one width, it is not really two widths. It is so wide that it will not go in the front end of some of the engines and they cut it two widths. It is lapped and bolted together. It is bolted together after it is put in the front end of the engine. The large nettings have doors to them. They have what we call a trap door which is about 18 inches square. We just cut out a piece of netting 18 inches square; we get a piece of netting large enough to cover the opening all the way around, and put on a re-enforcing strip ⅜ of an inch thick and two inches wide, and we have key bolts screwed through the netting into the piece of iron and make slits in them for keys, and there is another frame made of the same size with the holes corresponding, and the stays run through the holes, and there is a piece of netting riveted to the independent frame, and then it is all slipped through the studs and fastened with keys. Sometimes they are bolted together, and when they are bolted together they are tightened jam up. The purpose is to keep them together. It is a tapering key that is used being in shape somewhat like the point of scissors. The netting fits up and the bolt goes through the slot of it and the key is put in the slot. As the key is driven in the netting is drawn tight. As near as I remember, there are about 12 keys. There are no doors with only one key to hold them up. Some of the engines have but one key, but they are differently constructed engines. That would be the kind we call a trap door, and it is hinged at the bottom. It is hinged with three hinges at the bottom and works on hinges, and the key bolt is fastened to the top of the boiler and goes through holes through the frame, and that frame fits around the circle of the boiler. The key goes through the plate at the top. The bolt that goes through the top of the door is ¾ of an inch in diameter. The tapering key that draws the door up and holds in it about four and a half inches long. That is the only key

that is provided to hold the door in shape. The hinges hold it up. If the key is out, of course the door will come open. That door in different engines varies from 48 to 58 inches. The tapering key is driven in with a hammer and bent up to prevent it coming out. They are in the nature of a cotter key, a split, flat key. If the key is not properly driven in and bent, the natural consequence would be to let the door slip over a little and leave a slight opening. I do not believe the key could fall away from the boiler far enough to leave an opening larger than the meshes in the netting. There could be very little wear of the key on account of its position. It is at the front end of the boiler and the heat might make the key soft and also make the bolt soft. A soft key and a soft bolt would wear more than hard ones. There is no way of telling how much they would wear in a given length of time, but even if the key came out the trap would not fall as long as they worked the engine. The constant draft would prevent its falling. The constant draft would cause a constant vibration. The exhaust of the engine is not constant, of course. When the wheels revolve you have two exhausts on each side of the engine, which would make four exhausts to the whole engine. There is a constant puffing when the engine is working. What effect the exhaust of the engine would have on the wear of the bolt and key is entirely problematical. If the engine was throwing sparks the size of the end of a mans little finger, I would take it for granted that there was something the matter with the spark arresting apparatus of the engine, whether it was in the netting, door or where. I would take it for granted that it would be dangerous to operate the engine that way, dangerous to property along the right-of-way. The meshes in the netting are 3-16 of inch one way and a little more the other way.

Re-direct examination:

I find engine 140 in my book. It came into the shop November 11, 1909, and went out of the shop December 18, 1909. The engine was repaired; 38 stay bolts were supplied,

50 new flues, and a new stack and front end. Those are the repairs done on the engine at that time. I have not looked for repairs since that time on engine 140. I will look, and if I find others, will call your attention to them.

L. J. Womack, a witness for the Texas & Pacific Railway Company, testified:

I remember the fire at the Marshall Compress in March, 1910. I was near the east end of the platform weighing cotton with Mr. Pruitt. I had been on the west end of the platform in the morning. I found around there what I found about the compress all the time when they were sampling cotton. There is always loose cotton between the bales when they do that. I found loose cotton scattered around the bales on the west end; they had been sampling cotton. To sample cotton they cut holes in the bagging and pull the cotton out. The holes cut is usually about a foot and a half or two feet across the bale; they go nearly across the bale. They pull cotton out at the hole and of course cotton wastes out of the bale. Of course I think I know what they had been doing to condition the cotton, and what they do around the cotton yard and compress all the time. They pick the rotten cotton off, that is where the cotton is damaged. They take the heads off and pick it. I did not see any baled cotton with the heads off. I merely walked around the compress and saw the general condition of the compress. I know of course that there was damaged cotton there. There was enough loose cotton there to make it more combustible than it would have been without the loose cotton. I was there in the forenoon and the cotton was burned in the afternoon about four or five o'clock. I did not see the cinders falling there. I heard Mr. Pruitt mention about the cinders, but I did not look for them. I heard him make some remark to Mr. McElroy about the danger to the compress from engines passing there to the effect that he was in a dangerous place. I don't know what the remark was exactly.

Cross examination by the Compress Company:

On the afternoon of the fire the work was being done on

the east side of the platform, east of the compress building. During the morning I had occasion to go on the west side of the platform west of the compress building. I saw some loose cotton around on the platform west of the compress building, but I could not state the exact position of it I noticed they had sampled cotton around there. I know the hands at the compress put plaintiff's cotton in condition, but I do not know the exact time this work was done. I weighed the cotton after it was put in condition, and the cotton in condition was on the platform north and northwest from the compress building. They rolled the cotton out of the compress building and I weighed it as they rolled it out. I did not see just where the cotton was when it was rolled out, and did not see it put in condition. The conditioning might have been done in the compress building as far as I know. I don't know where any of the cotton was put in condition. I can not say that I saw any loose cotton on the south side of the platform next to the Texas & Pacific track. West of the compress building is where I saw the loose cotton. My recollection of the matter will not permit me to state to the jury that the loose cotton was confined to the space northwest of the compress building. It might have been there as far as I know. I do not believe I saw any loose cotton on the south part of the platform next to the Texas & Pacific Railway. It is a fact that on all platforms more or less loose cotton is scattered around among the bales and on the platform. I run the cotton yard at Marshall. Have been in the cotton business thirty years. I have been about cotton yards a great deal, but never about a compress except the one at Marshall. I have always had business with the Marshall compress and have been about it a great deal. In sampling cotton loose bunches of cotton will often drop on the platform between the bales. My cotton yard is 100 or 150 feet from the main line of the Marshall & East Texas Railway. At the closest point to the yards I guess it is about 60 feet, and the side track runs in 15 or 20 feet of the yard. I do not know how far the main line of the Texas & Pacific Railway is from the west part

of the platform. The western part of the platform, according to the plat which you say is correct, is 58 feet from the center of the Texas & Pacific main track. Cotton is ordinarily kept in cotton yards lying on its sides or standing on its ends and close to the main line of a railroad. My cotton yard has been at its present location five or six years. Cotton is handled at the yard very much as it is at the compress, except that it is not compressed. There would be about the same accumulation of cotton in the yard as at the compress, except we condition cotton at the yard.

Q. I will ask you this question, and ask you not to answer it until the court can decide whether it is a proper question or not. The question I desire to ask is this: State whether or not at any time during the day of the fire you observed at the compress or on the platform anything, any act or omission of the compress people which impressed you at the time as being unusual in the management of compresses?

To this question and the answer sought to be elicited thereby the Texas & Pacific Railway Company objected because irrelevant and immaterial and calling for the conclusion and opinion of the witness. The objection was overruled by the court, whereupon counsel for the compress company stated that he wanted to add to the question "or cotton yards," which the court permitted, not changing the ruling on the objection, and the witness answered "there was nothing unusual that I saw.' To the action of the court in permitting the testimony over its objections, the Texas & Pacific Railway Company excepted in open court, and still excepts and in this behalf tenders its bill of exception.

I know the fire started on the west end of the platform, but could not say just where.

Re-direct examination:

I could not say whether there were box cars on the sidetrack next to the platform at the time of the fire. I did not see any cinders falling on the platform. If cinders fell on

the platform as large as one's thumb, it would be rather extraordinary I think.

Cross examination by plaintiff:

I was on the east end of the platform about the middle from north to south at the time the fire started. Was quite a distance from the Texas & Pacific track. I was close to the east door of the main compress building at the time the fire started.

Re-direct examination:

I was about the middle of the compress building as far as north and south was concerned and east of the compress building. The wall of the building was between me and where the fire started; the fire was on the other side of the building, and I could not see the fire from where I was when it started.

George Pearsall testified for the Texas & Pacific Railway Company:

I am a boilermaker for the Texas & Pacific Railway Company at Marshall and was so engaged in March, 1910. I made a special inspection of engine 359 shortly after March 8, 1910. I put in a new front end before the 8th. I heard about the fire and that caused me to make another inspection of the engine. I found the condition of the spark arrester in engine 359 to be good. The sample of netting you show me is the kind that was in the engine and it was standard. The same kind of netting is used on several roads in this country, but I could not at this time name the roads. Some of the roads use a netting with a larger mesh. Mr. B. King was with me when I made the last inspection of engine 359; he is a regular inspector. I am classed as a boilermaker and do front end work. I know engine 140, but can not state any date that I inspected that engine. They would call me at any hour of the night when an engine would choke with cinders in the front end.

Cross examination by plaintiff:

Engine 359 did not have a trap door. 140 had a door

about 30 inches back from the smoke box. In the bottom part of the smoke box there is a hole to let out the accumulation of cinders. The front end of the engine is round, and extends out about five feet. The hole in the bottom is put there for the purpose of letting cinders out at the ash pit or when the engine would get choked up on the road, they could let the cinders out there, but I don't know that they clean the engines on the road. I do not know anything about taking a crow-bar and going after the netting when it is choked. I have never worked out on the road. I have seen holes in nettings, but could not say they were made with a bar. I have seen holes in nettings where they had worn thin and finally broken out. I have never seen a netting where the fireman had given it the "crow-bar treatment." I never saw a hole of that kind. Engine 359 ran to Fort Worth on the 8th and came back about the 10th and I inspected her. I put the netting in that engine. The netting had a big door or man-hole in it 24x26. We cut the netting out and then put a 2x⅜ frame around it and bolt that on, and it is bolted on with eight or ten bolts. We put a piece of netting over the opening we cut. There are slot keys, tapering keys put in it. We drive them in with a hammer and bend them up after they go in to keep the keys from coming out of the door. This particular engine had that kind of trap door or man-hole. The door was 24x26. It is about eight inches from the bottom of the netting. The netting slopes at an angle of about 45 degrees back about the center of the fire box, or smoke box I mean, and in that netting is the door I speak of. If the keys are driven in tight, the door fits up snugly in the opening, and if the keys are not driven in tight ,it lacks just that much of fitting snugly. I am expected to tighten them up. The purpose of the spark arrester is to keep from setting out fire, to keep the cinders from coming out and setting things on fire on the outside. It is intended to have it so nothing but such cinders as would pass through the meshes in the netting would escape. To have the meshes in the netting larger would tend to make it dangerous to property near the

track because of the escape of cinders. The netting is fastened in the front end with angle irons; the angle irons are ⅜ and sometimes a half inch. The angle irons are put on with bolts and tightened with nuts. Going in at the front end of the engine, those nuts are next to you. Some of the nettings are in two pieces and some in one piece, but I could not say as to 359. The netting is fastened at the bottom in the same way with an angle iron. It is fastened with bolts. 140 has the netting fastened with hinges. On engine 359 the netting is fastened snug and tight and that holds it in position. We put a hole through the netting and put on the angle iron and put a washer on the head of the plate against the angle iron and tighten the nut on the outside. The netting is on the inside of the angle iron and tightens against the angle iron. There is just one nut to the angle iron and bolt and no cotter key. The nuts can be taken loose with a wrench. I do not knew whether the exhaust of the engine has a tendency to cause the netting to vibrate or give it a continual pulsation. We do not turn out work that is loose and unfinished. Several of the nuts could be loose and then the netting would be good and tight; they are close together. I could not say if the nuts were loose there would be a vibration because I have never turned out work that way. The question of the escape of sparks depends on the size of the meshes in the netting and the manner in which the netting is put in. If the top keys are out the netting might be a little loose at the top.

W. H. Lebaun testified for Texas & Pacific Ry. Co.:

I am a switch engineer on the T. & P. Ry. at Marshall, and this was my business in March, 1910. I remember the compress fire and was running engine 140 at that time. I was on the engine shoving the freight train and about even with the fire when I first discovered it. I gave the alarm of fire. At the time I discovered the fire 10 or 15 bales seem to be burning, and I believe the fire was a little longer north and south than east and west. I do not remember how far the fire was from the south edge of the compress platform.

We stopped by the fire a little bit and then went on down to the water tank. I remember shoving No. 5, the passsenger train over the hill. I don't remember the number of the freight train, but we were shoving it some 10 or 15 minutes after we shoved the passenger train. After we had returned from shoving the passenger train over the hill, we went in the yard and waited for the local to come out and then got behind and commenced shoving her over the hill. I do not know how long the fire had been burning at the time I discovered it. Do not know how long it would take the fire to spread over 10 or 15 bales of cotton. There were some box cars on the compress switch track, but I don't remember just where they were. The switch next to the platform holds 16 cars and the other switch between the main line and the compress holds 9 cars. I have been running a switch engine on the T. & P. nearly 18 years. In order to shove the train I had to operate the engine as I was doing at that time, shove the train as hard as I could. I had to put on all the steam I could spare. I did not do anything else that would cause fire to escape except to work the engine as hard as I could to save steam and water. We shoved the freight three-quarters of a mile and it is up hill all the way. It is considered a steep grade and that is the reason it takes two engines to move the train over the hill.

Cross examination by the Compress Company:

The switch engine was just about opposite and maybe a little past the fire when I discovered it. It was very close to a point due south of the fire. I was on the main track. I had pushed the passenger train up the hill before the fire, and had also pushed the freight past and my engine was at the rear of the freight. I don't remember just how long the freight train was, but usually it is a long one.

Cross examination by plaintiff:

The proper way to operate an engine over that grade is to hook the engine up as close as possible to get sufficient power to go over the grade. We use as little steam as pos-

sible in order to have the steam and water at the top of the hill. We set the reverse lever as near the center of the quadrant as possible to get sufficient steam. If the reverse lever is put over in the corner, as we call it the engine is longer taking steam. The greater the pressure in the cylinders, the greater amount of sparks thrown out of the smoke stack. You get more power out of the engine with the lever down in the corner, especially at slow speed. With the engine hooked close, you don't get much power until you start. You have to get the engine moving to get power that way. I do not remember in pushing the passenger train where I had the lever, but I never keep it in the corner because those little engines don't make the speed to do the work, don't make the steam I mean. I presume the passenger train was making eight or ten miles an hour at the time we passed the compress. I was giving the engine just about as much steam as I thought she could spare, and helping the passenger train all I could. I did not shut the engine off and roll by the compress, but kept giving her all the steam I could spare. We hardly ever move the throttle lever after we start an engine; I don't suppose it varies an inch in three or four hours. An engine does not throw sparks when the steam is shut off unless the blower is on. There is a pipe that runs into the smoke stack and there is a valve in the cab by which you can turn steam up in the base of the smoke stack and that creates a draft to make the fire burn. The blower is on the firemans side of the boiler and he sometimes puts it on and sometimes the engineer puts it on. I am satisfied there would be no use putting the blower on when you are working steam through the engine. I do not know whether the blower was on the day of the fire, but I do know we seldom have the blower on when working steam.

Re-direct examination:

The crossing to which place we shoved trains was about 250 yards west of the compress. I don't remember that we had the blower on when we went by the compress. The blower does not have anything like the same suction power

that the exhaust does, I don't suppose 1-10 or 1-20 as much.

F. L. Maxfield testified for the Texas & Pacific Ry. Co.:

I am a locomotive engineer in the employment of the Texas & Pacific Ry. Co., and in March, 1910, I was running engine 202 from Texarkana to Longview Junction. I remember hearing aboutt he compress fire the next day after it occurred. I did not know the fire had occurred the day I passed the compress. I passed the compress about four o'clock in the afternoon, and passenger No. 5 had gone out ahead of me; I was about 15 or 20 minutes behind No. 5. I did not see any fire as I passed the platform. I was going up hill and working my engine when I passed the compress: I had to work steam to climb the hill. I opened the throttle and worked the reverse lever down to about half stroke. I did not do anything that was not necessary to get the train over the hill. My engine did not throw many cinders and the ones she did throw were fine; we were using Arkansas coal and the engine did not seem to clean the front end good; what cinders she threw out were fine. Arkansas coal is soft coal and dont throw cinders like hard coal. If the cinders are not thrown out they stay in the front end and we opened the front end and shoveled them out. The fact that the cinders stayed in the front end would be evidence that the engine was throwing fewer cinders than ordinarily.

Cross examination by the plaintiff:

I got my engine at Texarkana that day. I had been running that engine regularly, and it went over the road every day except Sunday. It would go to Texarkana one day and back the next day. I was passing the compress as near as I remember about the usual time. The engine had a habit of clogging up. I don't remember opening the front end on that trip. There was an opening under the front end to clean out the cinders. There was a plug under there four inches in diameter. Cinders were sometimes cleaned out there, and we would have to take the plug out. I never did see the fireman operate the front end of that engine with a craw-bar. I never noticed him jar the netting with a crow-

bar. I never noticed him punching the netting with a crow-bar. I never did notice him go after that netting with a crow-bar; that would not be allowed. I never let the fireman do that. If I happened to see him punching the netting, I would tell him not to do it, but I never saw him doing it. I would not tell the superintendent that I did not stop him. If there was an opening in the netting that let cinders through as big as my thumb, there would be something wrong with the netting, and it would be dangerous to have property along the road. I went out close behind No. 5 on the day of the fire. I started my train at the Y of the switch in Marshall. I did not come into Marshall from Texarkana and then back down in the Marshall yard. I come from Texarkana and backed into Marshall and pulled up to clear the Y, and started right from the Y after the switch engine got back from shoving No. 5 over the hill. I was on the south side of the Y. It is near a half mile from where I started to the compress. I gave my engine all the steam I could and endeavored to get up speed as fast as possible. When we passed the compress we were going about eight miles an hour. I put the lever about the center of the quadrant and gave the engine a half stroke. If the lever is put in the corner and the engine given the full stroke of the piston, it would give more power while it lasted, and the reason I hook it up is for the reason of conserving the steam. I always set the engine back after I get the train started to about a half stroke so as to handle the train. That is the only way I remember, because it was customary to run the engine that way. As to what I actually did on the occasion of the fire I dont remember. The blower was not on. We never use the blower working steam because it does no good. The blower would not add to the draft when we were working steam. The amount of steam turned in the pipe in the stack makes the draft when the engine is working. The more steam that is turned on the greater the exhaust. In going up the hill I gave the engine all the steam I could with a view of increasing the speed of the train until I got to the top of the hill. If I had shut off the

steam in passing the compress, it would have had the effect of decreasing the speed of the train. If I had shut off the steam in passing the compress, the switch engine could not have pushed the engine and train. If I had shut up the engine, the train would of its own momentum have run as far as 500 or 600 feet. If I had shut off the steam when I got to the platform and the switch engine had shut off the train would have rolled to the far end of the platform. The number of my engine was 202. I have been running an engine for the Texas & Pacific Ry. Co. 15 years. Did not see any fire at the time I passed the compress.

R. R. Ramsey testified for the Texas & Pacific Ry. Co.:

I am and was in March, 1910, an engineer in the employ of the Texas & Pacific Ry. Co. and pulled the train known as 5 and 6, which is a fast passenger train. I have worked for the Texas & Pacific Ry. Co. 32 years, and as an engineer 28 years. I am now traveling engineer, my promotion taking effect tomorrow. I remember hearing of the compress fire at Marshall and was called on soon afterwards for a statement. I heard of the fire the day after it occurred when I returned to Marshall. Don't remember whether the switch engine pushed my train over the hill that day or not. It usually does. In order to get over the hill at Marshall I have to open the engine up and let her do her work; in other words, manipulate the machinery of the engine. I did not do anything that was not necessary to get the engine over the hill. The wheels of an engine slip by reason of the adhesion to the rails slipping or breaking. Sometimes if the rail is hot and the power is too great, the adhesion will break and the wheels slip. I do not know the condition of my engine in reference to the spark arresting apparatus; I did not examine her. Ordinarily I would go to Fort Worth one day and back the next and then lay off a day.

Cross examination by plaintiff:

I could not say whether my train was on time or not. I started out of Marshall giving my engine steam with the

lever down in the corner, so to speak and gave it as much steam as I could to get in motion to go over the hill. I presume in passing the compress the train was going 12 or 15 miles an hour. This was the engine's first trip out of the shop and I was feeling of her on the start and was not going after her as heavily as I would if I had had her a day or two. I do not remember whether the engine slipped as I went out that day. If you give an engine more power than the adhesive force to the rail she will slip. When the wheels slip they run round and round and do not get anywhere, turns perhaps at the rate of fifty miles an hour and gets nowhere.

J. M. Pruitt, being re-called by plaintiff, testified:

I stated that I wrote out a statement for Mr. Edwards. I have not seen that statement since I have been here. I saw Mr. Edwards there a day or so after the fire. Mr. Edwards called my attention to several cinders at the compress, some cinders he gathered up. There was one cinder that I remmber; it looked to me like the bale of cotton of cotton caught fire from it; the cotton seemed to scorched around it. If I made any notation on any paper I don't remember it. The cinders you show me look very much like the ones Mr. Edwards had, and are the ones I saw him gather up to the best of my judgment. He called my attention to one cinder on a bale of cotton and said he saw it fall, and he took the cinder up with the cotton around it and wrapped it up.

Cross examination by Texas & Pacific Ry. Co.:

The cinder was lying in a little hole in a bale of cotton when he called my attention to it. He called my attention to the cinder a day or two after the fire. The bale of cotton was on the east end of the platform. The bale was lying on its side in a row. The cinder was on the sample side of the bale of cotton, what we call the sample side. There are two flat and two oval sides to a bale of cotton, and this cinder was on the oval side of the bale. They generally take

a knife and make a half moon to get a sample from a bale of cotton, and it would be about 15 inches long. I did not see the cinder come from an engine. I think Mr. Edwards was there representing the insurance companies, but I did not know at the time who he was representing.

Re-direct examination:

The statement you show me is the one I wrote and signed for Mr. Edwards.

Re-cross examination by Texas & Pacific Ry. Co.:

I dont think anything is said in my statement about the size of the cinders. I called Mr. McElroy around to see the freight train go by and about that time the alarm was sounded.

THE TEXAS & PACIFIC RAILWAY COMPANY introduced in evidence a deed from Sarah Ann Kelsey to the Southern Pacific Ry. Co., dated December 31, 1869, conveying a right-of-way 200 feet wide at the place where the compress is located, and it is offered for the purpose of showing that the right-of-way extends out even with the compress building wall on the north of the railroad at Marshall, and that 42 feet of the compress platform is on the right-of-way of the Texas & Pacific Ry. Co., and we offer the fact that the Legislature of Texas in 1873 authorized the Texas & Pacific Railway Company to absorb the Southern Pacific Ry., which is a matter of judicial knowledge.

J. B. Harris testified for the Texas & Pacific Ry. Co.:

In March, 1910, I was a fireman working for the Texas & Pacific Ry. Co. with Maxfield, engineer. I am now working for the Kansas City Southern as fireman. I heard at Longview of the compress fire at Marshall. We passed the compress about four o'clock in the afternoon, and followed No. 5 In passing the compress I guess I was firing the engine. There is a long up grade there, and in passing there there would be more reason for my shoveling in coal than going down hill. You have to have a hotter fire in going

up hill than down hill, and I was putting in coal for the purpose of keeping up steam.

Cross examination:

In going up the hill it was not necessary to be putting in coal all the time, and when I was not putting in coal I was on the seat-box. I would put in four or five scoops of coal and that would take a matter of a minute or so. We do not have to fire anything extra up that hill because we have a switch engine shoving us. I don't know whether I was putting coal when we passed the compress or not, and I don't remember the different places on the hill where I put in coal nor the intervals between the times of putting in coal. I think we were using Arkansas coal on that trip. That was not as good as other coal and the front end would stop up frequently; the cinders would catch in the netting in the front end and the exhaust would not draw them out. The front end would get full of cinders and the engine would not get any draft. All engines are self-cleaners. This engine had not been cleaning herself. When the cinders bank up in front and we have to knock them out. I never did treat the front end with a crow-bar. A man could not knock a hole in the netting with a crow-bar from the side, but I never tried it. The bar carried on the engine is a little steel bar three feet long. There is what is called a little front end bar to knock cinders out of the front end with. I dont think the netting would ever get red hot, but it would get pretty hot. The cinders are raked out of the front end with a bar. A front end bar would weigh four or five pounds. I don't know that cinders come out in the smoke stack red hot. I have fired an engine at night and seen live coals come out of the smoke stack. I never saw a blaze of fire come out of the smoke stack of a coal burner. I have seen an engine slip and enough fire come to the top of the smoke stack to make it light, but no blaze of fire would come out. The door in the netting is supposed to fit up tight and you could not get a bar between the door and the balance of the netting. It is necessary for spark arresters to be

examined by the boilermakers every trip the engine makes. I think a record is kept of the inspections of engines. You can go through a round house every day in the week and see them inspecting engines. I do not go through the round house to see that the men perform their duties. That is not my business; I am a fireman.

There is a hole in the bottom of the front end with a plug in it, and the plug has a handle and can be pulled around. You open up the side and shove the cinders out with a bar. There is a little hole five or six inches in diameter in the side that you open to put the bar in and shove the cinders out the bottom hole. The netting is not in such position that it can be punched with a bar from the side hole.

E. W. Merritt testified for the Texas & Pacific Ry. Co.:

I am claim agent for the Texas & Pacific Ry. Co.. I made some investigation in reference to the compress fire at Marshall. I went to see Mr. Pruitt at Dallas and the paper you show me is my report of the visit to Mr. Pruitt. I saw Mr. Pruitt in East Dallas at his residence. I talked to him and he told me what he knew about the fire; he declined to sign a written statement. He said he did not want to sign a statement. This statement is a correct report of my interview with him as near as I could reproduce it. I wrote the report 10 or 15 minutes after the interview. Mr. Pruitt told me the fire started three or four bales from the south edge of the platform.

The Texas & Pacific Railway Company propounded to the witness the following questions:

Q. Did he say he saw a lot of bales with the heads off on the west part of the platform?

Q. Did he state on that occasion that he noticed that the situation there did not appear safe?

Q. Did he state in conection with the loose cotton being picked over by the negroes that he asked Mr. McElroy if he was cleaning up?

Q. Did he state on that occasion that the fire spread

quicker or more rapidly or something to that effect because of the loose cotton?

The Compress Company objected to each and every one of these questions when propounded to the witness on the ground that no proper predicate had been laid for the impeachment of the witness Pruitt upon the subjects inquired about. The objections were sustained by the court and the witness not permitted to answer the questions. To this action of the court the defendant Texas & Pacific Ry. Co. then and there in open court excepted and still excepts and in this behalf tenders its bill of exception.

J. T. Connor testified by deposition for the Texas & Pacific Ry. Co.:

I am 46 years of age and reside in Houston, Tex. Prior to the 1st of July, 1912, for thirty years I was in the employ of the H. & T. C. Ry. Co. and the Harriman lines holding positions from machinist's helper to superintendent of motive power, the last named position being held for three years. The Harriman lines in Louisiana and Texas were using the standard Master Mechanic's front end, and on the H. & T. C. and the H. E. & W. T. railroads they were using 8x3 mesh wire netting No. 10 wire which made the openings about 3-16 of an inch square. The roads of Texas which were using oil at that time were the H. & T. C., which had only a part of its engines equipped for oil, and the H. E. & W. T. which had all its engines equipped for oil except its switch engines; also the T. & N. O. railroad which had oil and coal burners. Oil burners do not emit any sparks other than at such times when the engine is being sanded, then there may be a few sparks come from the stack.

Cross examination:

I do not know the character of spark arresters in use by the Texas & Pacific Railway Company. There is what is known as the standard Master Mechanic's spark arrester used by a great many railroads, but in reference to the number of meshes per inch it is left entirely with those in charge

of the lines. Some lines use 3x3 No. 10 wire, others 3x3 No. 12 and still others 4x4 No. 12. I am not familiar with the spark arresters used by the Texas & Pacific Railroad in 1910. The objection that prevents all the railroads in the country burning oil in their engines is the scarcity of oil. There is no oil company that will contract to furnish oil for a specific time. It would cost about $425.00 to convert an ordinary coal-burning engine into an oil-burning engine, and the cost of changing the said engine back to a coal burner would be about $125.00. The H. & T. C. Railroad has converted some of its engines back from oil burners to coal burners on account of the scarcity of oil. It is a fact that railroads using oil have a line running through the oil-producing field at some place. It would be impracticable for all the railroads to use oil instead of coal as fuel. In order to convert a locomotive from a coal to an oil burner it would be necessary to take the engine off the road for some time in order to make the change. It is a fact that the Texas production of oil in 1905 was about 27 million barrels, and that it dropped to about 17 million barrels in 1906, and was about the same in 1907, and then dropped to about 10 million barrels in 1908. It is a fact that it requires about four barrels of oil to equal a ton of coal on a locomotive. Several railroads in Texas have abandoned the use of oil on their locomotives and changed back to coal. The H. & T. C. and the H. E. & W. T. Railroad companies have decreased the number of their oil-burning engines and increased the number that burn coal. There are but few railroads that do not have lines running into oil fields that use oil for fuel. It is a fact that if a spark arresting appliance were used on a locomotive which would entirely prevent the escape of sparks, the effectiveness of the engine in pulling heavy loads or trains up grades would be practically destroyed or greatly impaired. There is a difference of opinion among experienced railroad men possessing technical knowledge of the matter as to whether the perforated plate or the woven wire arrester is best for preventing the escape of sparks on railroads. It is absolutely necessary to have sufficient op-

enings in any spark arrester appliance for the exhaust of the engine and that with any spark arresting appliance which will permit the use of a locomotive with effectiveness sufficient to pull loads or trains up grades there is no way to prevent entirely the escape of sparks from the smoke stack of a locomotive.

J. W. Small testified by deposition for Texas & Pacific Railway Company:

Am 42 years of age and reside at Houston, Texas. Am assistant general manager in charge of the motive power department of the Sunset lines, and have been so engaged since December, 1911. Have held similar positions with other roads since 1906, and have been engaged in motive power department since 1887. Don't know what kind of spark arrester the Texas & Pacific Railroad used in January, February or March, 1910. Do not know what railroads in Texas used crude oil during that time. Don't know the kind of spark arrester used by the Texas & Pacific Railroad in March, 1910. There is a spark arrester known as the Master Mechanics Standard, but I do not know what roads use it, and the size of the meshes varies on different roads.

Cross examination:

The high cost of oil prevents roads from using it throughout the country. It costs from $300.00 to $400.00 to convert a coal burner into an oil burner and about $100.00 or $150.00 to change it back to a coal burner. In my judgment the supply of oil would not permit all the railroads in the country to use it as fuel and the price would be prohibitive. To convert a coal-burning engine into an oil-burner it would have to be kept out of the service for some time. It requires about four barrels of oil to equal a ton of coal on a locomotive. I know of no railroad companies that do not run into oil territory that use oil for fuel. There is a difference of opinion among railroad men as to the relative efficiency of perforated sheets and wire screens for spark arresters. I do not know of any spark arresting device which

would entirely eliminate front end cinders from escaping from the stack without impairing the efficiency of the locomotive.

James Doyle testified by deposition for the Texas & Pacific Railway Company:

Am 54 years of age and reside at Houston, Texas. Am a locomotive engineer and have been so engaged 30 years, and was 10 years traveling engineer. During January, February and March, 1910, the Southern Pacific, Houston & Texas Central and Houston, East & West Texas Railroads used the Master Mechanics standard front ends with a 3x3 mesh and No. 10 wire and are still using them. The Harriman lines in Texas were using crude oil at that time on some of their locomotives, and the Santa Fe was also using oil. The I. & G. N. and the T. B. V. had some oil burners. The efficiency of oil burners was equal to coal burners and there were no sparks.

Cross examination:

There was no difference in the construction of the spark arresters used by the Texas & Pacific Railway and the Houston & Texas Central and the Southern Pacific Railway in March, 1910. The Harriman lines are using a 3x3 mesh, and I do not know the size of the mesh used on the Texas & Pacific. There is no standard as to the netting used, as some roads use steel punched plates and some roads use wire netting. The insufficiency of the supply of oil prevents all roads from using it as fuel. The oil companies will not contract with the railroads to furnish oil for any given length of time. Cost of changing from a coal to an oil burner is from $250.00 to $500.00, and to change back from an oil-burner to a coal burner would cost $100.00. The Harriman lines have changed a good many oil burners back to coal burners on account of the high price of oil and the scarcity of same. The railroads that use oil have a line running through the oil producing fields at some place. It is a fact that it would be impracticable for all roads to use

oil for fuel because of the scarcity of oil and the fact that the price of oil would make its use cost much more than coal. To change a coal burner to an oil burner it would be necessary to take the locomotive off the road and out of the service for a time. The Texas production of oil in 1905 was about 27 million and that it dropped to about 17 million barrels in 1906 and was about the same in 1907 and then dropped to about 10 million barrels in 1908. It requires about 4 barrels of oil to equal a ton of coal in a locomotive. Several of the railroad companies in Texas which have heretofore used oil in the operation of their locomotives have changed a number of locomotives back to coal. The Houston & Texas Central and the Houston, East & West Texas Railroads have heretofore reduced the number of their oil burning engines and have increased the number that burn coal. Very few of any railroad companies having no lines running into an oil producing field use oil instead of coal as a fuel. If a spark arrester was used which would entirely prevent the escape of any sparks the effectiveness of the locomotive would be so far impaired as to render its use impracticable in pulling heavy loads or pulling trains up grade.

Geo. H. Langton testified for the Texas & Pacific Railway Co.:

I am Master Mechanic for the Texas & Pacific Ry. Co. at Marshall, and have charge of the motive power, engines and things like that. I have been a master mechanic for ten years. Know the charcter of spark arresting appliances used by the Texas & Pacific Ry. Co. We call it the standard master mechanic's front end, and it got that name because it was adopted by the Master Mechanics' Association. The different mechanics of different roads adopted that front end at one of their meetings at Atlantic City. It has been adopted seven or eight years. The inside of the extension front end is composed of the deflector plate, the diaphragm plate and the netting. The boiler has in it a number of pipes two inches in diameter, called flues, and the water in the boiler is all around the flues. The fire from the fire

box passes through the flues or pipes, and the sparks that are carried through the flues pass against a deflector plate of 3-16 inch steel which is a solid sheet. The sparks do not hit the deflector plate square but on a little incline. That throws the sparks down towards the bottom of the arch and they pass under the diaphragm and that is the main plate that sets on the same incline as the deflector plate. The diaphragm plate is adjustible and the sparks go underneath that, and if the fire burns too much in front, it is raised to create a draft further back. The sparks strike the deflector plate and that throws them down and the diaphragm plate throws them further down; they go down and under the diaphragm plate, and they are then thrown back towards the netting and beaten up very fine. The netting is above the diaphragm plate and further in front than the deflector plate. After the sparks go against the deflector plate and around under the diaphragm plate they are taken against the netting. The vacuum in the smoke stack takes them up there, and the vacuum is created by the exhaust. The exhaust pipe runs back of the netting and not through it; that runs up and comes out at the top and makes the exhaust in the smoke stack and that exhaust pulls everything through. The sparks are drawn up the exhaust or rather drawn by it. The wire of our netting is No. 11, and there are 3x3½ meshes to the inch. No. 10 wire is larger than No. 11. Many roads use No. 12. With a certain number of meshes to the inch the smaller the wire, the larger the openings would be. The idea in adopting the netting was to get the netting as fine as you can to get enough air through to create the combustion in the fire-box. With the smaller mesh we would not get enough air through to burn the fire. With the meshes larger the fire would burn better, but it would be more likely to cause damage by fire. If we could dispose of the front end altogether we would have better results as far as the engine's steaming is concerned. This netting is used all over the country where I have been for fifteen years. I have known roads that used a perforated plates instead of netting. The mesh-

es in this netting are longer one way than the other. If netting was made that would prevent the escape of fire at all you would not have any draft and the front end would block up and the engine stop. The perforated plate is a steel plate with oblong holes in it; the holes are about ¼ of an inch in width and an inch and a fourth in length. The plate is perforated to let the sparks and cinders through and keep the front end from filling. My objection to the plate is that it is smooth, in the first place, and cinders striking against it do not have anything to go against to grind them up, where with the netting it goes against a rough surface and there is more to pulverize the cinders. If a cinder strikes the woven wire and does not go through, it will fall back again and be picked up and beaten against the netting until it is small enough to pass through. The exhaust is presumed to throw the cinders against the plate. The netting keeps them turning back and forth in there, and the perforated plate has a smooth surface and does not break them up so well. The greatest objection to the perforated plate is that it is apt to crack and the inspector not be able to detect the crack. They will crack from one hole to another and when the inspector opens the front end to examine it it is covered with soot and perfectly smooth and there is no chance to inspect it and detect the crack, and when you get out on the road the engine will throw sparks, and the vibration of the plate will cause the cracks to open large enough to shove your hand through. If the engine was standing still the crack would not stand open. When I was on the Kansas City Southern we threw them away on that account. (Witness produced a model of his own make and explained the extension front end to the jury).

Cross examination:

The roads that use the steel plate in preference to the netting use 3-16 inch steel. It is in about the same position in the front end as the wire screen. If the engine is out on the road the constant vibration of the plate is liable to crack

the plate between the holes and cause trouble. The constant vibration is caused by the exhaust. The exhaust pulls on the plate. It would be pushed like shoving it with your hand, pushed or pulled by the exhaust. When you create the vacuum, there would be 10. 7-10 pounds of air to the square inch; I may be mistaken about that. The exhaust creates a kind of pulsation. This netting is standard but the size of the meshes and the size of the wire is left largely to the individual roads. The Southern Pacific uses No. 10 wire. I have noticed the size of the openings in the netting we have here. The openings vary a little in this netting, but very little. This piece was cut from a piece of new netting. This rule shows the openings to be 3-16 by ¼ or about that. It is a little more than a quarter of an inch one way; you might find some a little larger than that. That piece in being handled might be sprung a little bit. There are two and a half wires one way and three the other to the inch. You could not look at the piece of netting and tell without measuring it that some of the meshes were larger than others until your attention was directed to it. The variation is small, perhaps 1-32 of an inch. Some of the nettings are put in in one piece, while others have a door in them almost as large as the whole front end. The size of the trap doors varies in different engines. In some of them they are as large as four feet wide at the base. I do not know about the netting in engine 202. When the netting has hinges at the bottom there is an angle iron at the top, and the netting is held up and a key passed through that, and that is a tapering key. The key is driven in and spread so it will not come out. The netting is reinforced by a piece of iron rivited to the edge so there will be no buckle to it. When iron gets hot in some instances it will warp or buckle. There is no chance for buckling in a position of that kind; everything comes together. There is no such thing as not having the netting perfectly tight; the mechanics are there for that purpose. If the mechanic got a key too small and left it in there, some one would detect it. I don't think it would ever get out of the house without be-

ing detected. There are always two men on the job, and I don't believe an engine could get out in that condition. If the key was too small, that would cause more vibration of the netting, but I don't think it would give it a greater tendency to warp. The exhaust would put it against the joint and make it as tight as if the key was in there. A chunk of anything could not get under the edge of the screen because of the suction; it is taken through the holes of the netting and not around the edges. A loose key would not cause it to throw any more fire. A spark may come through the netting and when it hits the cold air, it will pop like corn and get three times as big as the opening through the netting. I know from practical experience that chunks of coal the size of a mans little finger will go through the netting when it is in good condition. I do not know that I ever saw one go through a netting the cinder being a half inch in diameter. In the steel plate used instead of a netting the slots or holes have a smooth surface.

B. C. McElroy testified for the Texas & Pacific Ry. Co.:

I remember on the 1st of October, 1912, that Mr. Behn Cook came to the compress to make some measurements. I showed him about the place on the platform where I claimed the fire started. He made a measurement from there to the main line, and I remember that it was 84 feet.

Cross examination by Compress Company:

The 84 feet was from the place where the fire started to the center of the Texas & Pacific main line. I live at Marshall and am manager of the compress and have held that position nine years. I managed the compress at Shreveport two years prior to that. The Marshall compress handles from twenty-five to seventy thousand bales of cotton a season. The compress is located about a quarter of a mile west of the T. & P. depot at Marshall, and its length is between five and six hundred feet from the extreme of the platform from one end to the other east and west, and running north and south 125 to 190 feet. Very nearly half of

the plat form at its middle portion was covered by the compress house. The house is 300 feet long by 125 feet wide. The house is used for compressing cotton and contains the machinery. It is not used generally as a storage room for cotton. About the 1st of January Mr. Rosborough asked that I permit him to place the cotton at the compress, stating that it was damaging at the local yard run by Mr. Womack, which is about a mile from the compress. I told him at that time we could not do it; that we had considerable cotton on the platform, and I did not care to put any more on there, and also that I had been requested by another party to allow him to do the same thing. He insisted several times, and when the compress got pretty well cleaned I told him to send his cotton ahead. It began arriving at the compress on January 19, 1910, and continued up until March 8 of the same year. I put the cotton that was merchantable in the press room and the cotton that was damaged I put in condition just as it arrived there. Mr. Rosborough instructed me to put it in condition. He did not tell me at that time that he had sold the cotton. I was to pick the wet and damaged cotton off the bales and put the necessary bagging on to cover it and the ties back on and put the cotton in a merchantable condition. I did not make a charge for the conditioning of the cotton, but got the damaged pickings for the labor of conditioning it. I was to put the cotton in condition, and that carried with it the putting on of new bagging if necessary. The damaged cotton would hardly reimburse me for the price of the labor in conditioning the cotton. I was to get no compensation for the bagging I used. My experience has been that the pickings from damaged cotton will hardly pay for the labor of conditioning it. When I began to receive this cotton I put the damaged portion of it on the north side of the platform. It was conditioned on arrival and put in the press room as fast as we could. The damaged pickings were placed on the extreme north side of the platform north of the press room, which is farthest from the Texas & Pacific track. The conditioning of the cotton continued from January 19 up until

about the 2nd or 3rd of March. In handling cotton we generally place it on the open platform. I placed this cotton in the usual place on the platform, and placed it there in the usual way. Just before the fire I received word from Mr. Rosborough that he had sold the cotton and there would be a man there to receive it in a day or two, and he wanted me to have the cotton ready for delivery and that meant to line it up in a place where the man receiving it would have light and a place to inspect it and room to inspect it. I lined it up on the open platform, and that work can not be done in the press room. A man could not class cotton in there without better light. You have to have light and a place to grade cotton. I started to line the cotton up before the man got there and continued to do so after he got there. I did that in the usual and ordinary way that I had been doing such work theretofore. I placed cotton that I considered in a merchantable condition on the west end and south part of the platform. That cotton did not need to be put in condition.

Q. I will ask you whether or not there was any cotton at the south end and southwest end of the platform or in the region where the fire actually started that was in bad condition?

When the above question was asked the defendant Texas & Pacific Ry. Co. objected to the same because it was leading and called for the conclusion of the witness. The objection was overruled and the witness permitted to answer "no sir" to such question. To this action of the court the defendant Texas & Pacific Ry. Co. in open court excepted and still excepts and in this behalf tenders its bill of exception.

There was no cotton in that region with the bagging torn off and the cotton left in an exposed condition. There was no big-head cotton in that region. Of course all the heads are not of uniform size, some bales being larger than others. There were no bales with the heads off in that locality. There was no loose cotton scattered around in the region where the fire started. There was some damaged pickings

west of the northwest corner of the press room. The damaged picking was put in a space there. We had one crowd of negroes pulling the cotton off and putting it there and another crowd taking the cotton across over the Marshall & East Texas Railway to the loose house which is some distance from the platform. We had a place in front of the loose house where we dried the pickings and put them in condition to bale and baled them. That work was going on there when Pruitt came to take up the cotton. Mr. Pruitt came to the compress on the morning of March 8th. Mr. Rosborough was there that morning. Mr. Rosborough had been out there before a number of times. He was out there looking around the morning of the 8th. Mr. Pruitt got out there about 8 o'clock the morning of the 8th and began working on the east end of the platform. The cotton on the east end of the platform was all ready for inspection and classification. Mr. L. J. Womack was doing the weighing. The cotton that was being weighed on the east side of the platform was brought from the north side on trucks. That work went on all day up to the time of the fire. Mr. Pruitt mentioned to me the passing of the trains just a few minutes prior to the passing of the freight train. He remarked about the quantity of cinders on the run. I was on the north portion of the east platform at the time, and I walked down to the run after he spoke of it. The run is a 16-foot space that runs parallel with the loading track of the Texas & Pacific Ry. on the south side of the platform, and it is used for loading and unloading cotton. It is never used for storing cotton. At the time of the fire there was no cotton on the run-way, the run-way being used solely for loading and unloading cotton. I went down there and saw the freight train pass, and I had started towards the west end of the platform. I remained there while the freight train was passing to keep a look-out for cinders falling, just as a matter of caution by reason of the fact that my attention had been called to it, called to the cinders that fell from the other train. When I discovered the fire I ran down to it. I could not see the

fire until I got to the corner of the coal house, and at that time it was burning very rapidly, I suppose 20 or 30 bales or more were on fire when I got there. The fire was burning to the northward and I did everything I could to stop it; I attempted to segregate the burning cotton from the cotton that had not caught fire, but the wind was blowing and the fire traveling so fast I could not do it. In my judgment the fire originated about midway of the west platform between the coal house and the extreme western edge of the platform, and about 22 to 24 feet from the south edge of the platform. We have at the compress four fire hydrants, one with 100 feet of hose attached to it, and about 100 feet of extra hose, and about forty water barrels filled with water and about 80 buckets to carry water. There is one hydrant located at the southeast corner of the press room, another at the southwest, another at the northwest and another at the northeast. Water is available in the hydrants and in the barrels for fighting fire. I made provision for fighting fire under the directions of the insurance companies, their inspectors. I did everything they required. That is done for the purpose of getting insurance and procuring a cheaper rate. The wind at the time of the fire was blowing from the south or southwest. Whether I had conditioned the cotton for Mr. Rosborough or not, the compress would have gotten the compression of it. The railroads will not pass a compress, and to move the cotton and have it compressed at another compress, it would have had to pass our compress, which, I understand, is forbidden by law. That law, or rule, as I understand the matter, is passed by the railroad commission. The rule is to take it to the nearest compress. Ours was the nearest compress and there was no other compress in Marshall.

Cross examination by the plaintiff:

South of the compress there is a run-way along the Texas & Pacific switch track. That run-way extends out to the track, and it is connected with the main platform of the compress. At the time of the fire there was no cotton on

the run-way. The run-way is used for loading and unloading cotton. The wind was blowing from a little west of south. About 750 bales of cotton were burned at the compress. Mr. Pruitt came to me and spoke of the cinders falling when the passenger train went by and I went with him down to the run-way and remained there until the freight train passed. After the freight train passed I started to go to the west side and saw the smoke. A good many cinders were falling from the freight train, and I started to the west end of the platform as a matter of precaution. It is hard to describe the size of the cinders that were falling; they were of different shapes, they were not uniform; they ran from a very small cinder to a very large one. The largest ones at the biggest place would be as large as the end of either of my fingers. A good many cinders fell, and that was the condition that attracted my attention and caused me to start to the other end of the compress. There was no fire around there that morning; there was no fire in south of the compress or anywhere near the compress during the whole of the morning or afternoon. The size and quantity of cinders that fell from the freight engine was very unusual.

Re-direct examination by the Texas & Pacific Ry. Co.:

I can not state at what rate of speed the freight train was going in passing the compress. I say the cinders were unusual both in size and quantity. I never noticed any cinders fall there as large as the ones that fell on that particular day. The ones that fell on other days were about the size of an ordinary pea. I have stood on the run-way when a train was passing a number of times and observed the cinders that fell. When the wind was in the south I would stand on the run-way and notice the cinders that fell there. The falling of the cinders before the day of the fire called my attention to their size. On the day of the fire the wind was coming from a little west of south. It was not a light breeze but a high wind, in force and velocity about like the ordinary March wind. I did not notice any cinders

on the day of the fire falling further north than the run-way. I can not say whether they went further north than the run-way or not. I never have said that cinders from a train started the fire. There is no other way that the fire could have started that I know of. Cinders must have gone beyond the run-way to set the cotton afire, because there was no cotton on the run-way. I did not see the fire start and could not say in what bale of cotton it started. Robertson wanted to store cotton on the platform, and did store his cotton there. A portion of Robertsons cotton was on the west platfrom the day of the fire. Boyd's cotton was on the west platform the day of the fire. Boyd's and Rosborough's cotton was mixed together on the day of the fire, I mean Rosborough's and Robertson's was mixed together, and Boyd's was further to the west. In conditioning the cotton I picked the damaged cotton from the bales and put bagging on it. When we picked the damaged cotton off that would usually leave the end open for a few minutes and then tighten the hoops up, and if the bagging was rotten we would slip a patch in and tie it across. I would have one gang of men and women picking and another gang fixing the heads. The head would be exposed an hour or two or all day. I was not there all the time. Part of the time we were running the press. I mean from January up to the time of the fire. I might have run the press the day of the fire for several hours, I dont remember. None of the cotton on the west end of the platform had been sampled. It was put there to be received after the cotton on the east end was received. We brought some of it out of the cars and some of it out of the press room. Rosborough had sold all of the cotton and a man was there to receive it. We got cotton out of the cars after Rosborough sold it. He sold it five or six days prior to the day of the fire. The man that was to receive it got there that morning. The bales on the west end of the platform had not been received by the purchaser. Mr. Rosborough told me he had sold his whole lot of cotton and told me the price he was to receive for it, and the cotton was to be weighed up and inspected. The sale

had been made subject to weights and inspection. The result of the sampling I don't think was a condition of the sale. The purchaser sampled it for his own purposes. The cotton on the west platform was to be checked up and that was the purchasers business. Mr. Womack was to weigh the cotton. There was nothing except the weighing to be done. There was a small quantity of damaged pickings west of the northwest corner of the press room, which would be north of the middle of the west platform. What I mean by picking the cotton is pulling off the damaged cotton. We had one gang picking the damaged cotton and putting it in a space we had there, and another gang carrying it away. The space where we put the damaged cotton was a space where there were no bales of cotton. There was very little of the cotton damaged that was not wet. I was around the compress and the platform all the time during the day of the fire. What we call the loose room is north of the Marshall & East Texas Ry. and north of the compress. Some of Mr. Rosboroughs cotton reached the compress on the morning of the fire. I presume the reason the cotton was not all delivered to the compress at once was because they could not get the cars to deliver it. The cotton on the west end of the platform had not been classified. Boyd's cotton was not put on the platform like Rosborough's cotton. Robertson's cotton was received there with Rosborough's cotton. I learned that Rosborough had sold his cotton. The cotton on the west platform was put there after I learned that Rosborough had sold it. I could not state how much of plaintiff's cotton reached the compress on the 2nd, 3rd, 4th and 5th of March. Some of the cotton which was on the west platform came out of the press room, and had been on the west end of the platform two or three days before the fire. Robertson's cotton had been there the same length of time, but he had not sold his. I could not state whether the cotton that burned all came from the cars or partly from the cars and partly from the press room. The press house will hold about 1500 bales of cotton. Some of Rosborough's cotton was what I would call in bad condition, but I can not

state how much. Some of Rosborough's cotton at the time of the sale by him had not been conditioned. Between the sale and the time of the fire some of the cotton belonging to Rosborough had not been conditioned. The cotton was picked on the north end of the platform and carried over to the northwest side. The north part of the platform is nearer the loose house than the west part. We carried the loose cotton west from where we picked it and laid it down on the platform, and where it was laid on the platform was further from the loose house than the place where it was picked. Fire in cotton at the compress might come from match fire where matches were used by employes. I could not say that the hydrants were required by the insurance companies to protect the cotton from fire from passing engines, but rather for protection from fire no matter from what source communicated. The measurement of the distance of the compress and cotton from the railroad was a part of the investigation of the insurance companies. If the cotton caught from a cinder emitted from an engine, it must have been about 84 feet from the engine to the cotton ignited. I measured the distance and Mr. Cook and a couple of negroes helped me make the measurement. I had no way of exactly telling the direction of the wind on the day of the fire. I would judge the freight train would pass the compress going eight or ten miles an hour, and that would give some momentum to the sparks. The track by the compress is up grade. I believe the track curves to the right going west. My recollection is that my first knowledge of the fire was seeing the smoke coming over the coal room, but the whistle of the alarm by the engine and seeing the smoke were so close together I could not be sure. The loose house was about 24x24 feet. Ben Beasley was foreman of the compress hands. I could not state how many bales salvage I got from the 770 bales of Mr. Rosborough's cotton; could give no idea at this time.

Re-cross examination by plaintiff:

We were putting the pickings of loose cotton about oppo-

site the crossing to the loose house; we were putting it where it would finally have to go to get to the loose house. That was a convenient way to get it to the loose house.

Re-cross examination by Texas & Pacific Ry. Co.:

There was no cotton being picked on the northwest part of the platform; it was all picked north of the house. It was more convenient north of the house because it was more isolated. Of course I did not want to put it next to the right-of-way of the T. & P. Ry. or anything like that.

Re-cross examination by plaintiff:

The compress was not running the day of the fire. I know the plaintiff had a contract for the sale of the bulk of the cotton, but whether he agreed to sell 770 bales or 760 bales I do not know. I know he had agreed on the price per pound, but do not know how much he had agreed to sell and deliver. The custom is that the cotton must be put in merchantable condition, inspected and sold subject to inspection.

W. E. Ross testified for defendant Compress Company:

Live at Marshall; am a cotton buyer and have been in the business 15 years. My business takes me over East Texas, and sometimes in Louisiana and occasionally into Arkansas. My business required me to be around compresses considerable. Compresses are usually constructed on railroad tracks or spurs. The railroads have to have a way to get to the compresses for the purpose of loading and unloading cotton. All compresses I have visited have platforms on which they unload, load and receive and store cotton and have it lined up for the purpose of sampling and inspection. Conditioning cotton means to put it in merchantable condition, picking off wet or rotten fragments, patching bagging, etc., and lining it up on the platform so a man can go through it and get samples and make inspections and classifications. I know the compress at Marshall and have done business with it for about five years. I have no interest in the compress by ownership or in an official capacity. It

is not possible for cotton to be conditioned, sampled, inspected and classified in the press room at Marshall for the reason that there is not sufficient room and the light is not sufficient to see the cotton well enough to receive it by sample. I have received a great deal of cotton at the Marshall compress, and always receive it on the open platform. That is the customary way of receiving cotton at compresses throughout the country.

Cross examination by Texas & Pacific Ry. Co.:

Some compresses are on the main line of a railroad and some on switches. I suppose there is no benefit in a compress being on the main line of a railroad if it is on a spur or switch. The compress at Marshall is on a steep grade to the west, and that would cause passing engines to throw more sparks, and I believe a high wind from the south would carry sparks from the main line over on that platform. I should think an engine operating on a curve would be more apt to throw sparks than it would on straight track. I do not know the terms of the plaintiff's sale of the cotton. I was trying to buy his cotton myself. Plaintiff merely stated to me that he had sold his cotton and told me to whom he had sold.

Cross examination by plaintiff:

Plaintiff mentioned the price agreed upon for the cotton, and did not go into the details of his contract of sale.

Re-direct examination:

Cotton is not ordinarily pressed until it is ready for shipment. It is never pressed until the order is given the compress. Some compresses may press cotton when it is received, but customarily it is not prssed until orders are received to ship it. The sampling and receiving of the cotton is ordinarily done before it is pressed.

Charles L. Edwards testified for the Insurance Companies:

Live at Dallas, and my present business is that of a hor-

ticultural man. I have been a lawyer, but am not now in the practice of my profession. I made an investigation of the fire at the Marshall Compress. I went there at the request of Trezevant & Cochran, an insurance firm in Dallas. I do not now remember what companies were involved in the loss. I may have known at the time, but, if I did, it has passed out of my memory. I have never represented any particular company, but was employed by the agency. Crane & Crane are the attorneys representing the Trezevant & Cochran agency in Dallas. I was called to Dallas from Sherman for the Trezevant & Cochran people, who are interested in some branch of this litigation, and they wanted me to come to Jefferson as a witness, and when I reached Dallas I saw Mr. Crane and he told me there was a mistake about the setting of the case. I went to Crane's office to get the memorandum I had made of the investigation, and was told it was in Thompson's office, and I went there and got the papers, and returned to Mr. Crane's office and he was not there, and he afterwards phoned me that a mistake had been made about the setting of the case in which he was interested and that I would not be needed, and he told me to wait and go back to Sherman in the afternoon, and he wanted me to go and see Mr. Thompson. After reaching Mr. Thompson's office I was informed that I would be wanted here. I went to Marshall to make the investigation on the night of the next day after the fire. I left Dallas on the night of March 9th, and was in Marshall the morning of March 10th. I was in Marshall five days including Sunday. I went to the compress the first evening after getting to Marshall. I made a plat of the premises and the plat you show me is the one I made. Mr. McElroy, the manager, was the first white man I met after getting to the compress and Mr. Pruitt was there, and they were the only white men. There were some colored folks there, but I did not know them. I had an interview with Mr. McElroy and Mr. Pruitt. A good many trains passed the compress while I was there.

Q. Did you make any observations as to the result or effect insofar as sparks falling on the platform while you

were there was concerned? A. Yes sir, I watched the trains passing there more or less every day during my stay. I wanted to satisfy myself about this matter of throwing embers or cinders.

Q. Did you observe any sparks falling upon the platform during the passing of any trains over the road of the Texas & Pacific Railway while you were there? A. Well, my observations were in the day time, and I could not tell so well about sparks, but quite a number of cinders fell.

Q. I will ask you whether or not you gathered up any cinders? A. Yes sir, I gathered up quite a number of cinders.

Q. I will ask you, Mr. Edwards, whether or not you saw any of the cinders you gathered up fall? A. Yes sir, I saw all of them fall, if not quite all of them; there was some of them I did not see fall.

When the first of the above questions was propounded, and before any answer thereto had been elicited, the Texas & Pacific Railway Company objected to the question and the answer sought to be elicited thereby, as well as to any other questions and answers along the same line and relating to what occurred subsequent to the fire, because such testimony would be irrelevant and immaterial, not relating to the condition of the engine or engines alleged to have caused the fire which destroyd plaintiff's cotton, and too remote in point of time. These objections were overruled by the court and the witness permittd to testify in the presence of the jury as hereinbefore and hereinafter appears. To this action of the court defendant Texas & Pacific Railway Company then and there in open court excepted, still now excepts and in this behalf tenders its bill of exceptions.

I have here a cinder imbedded in a piece of cotton which is accompanied by a memorandum. I saw it fall. It is hardly so large as it was when I wrapped it up; some of it has been broken off. I took the cinder up immediately after it fell, or, rather, took it up as soon as I saw Mr. Pruitt and called him. I wanted it to lie there where it fell until I had a witness to verify the fact of its being there and lying

in the condition it was. This cinder fell on a bale of cotton to the eastward of the compress building. I could hardly state how far from the south edge of the compress platform proper it fell, but there were some bales of cotton running northward from a center line of the run-way and that bale of cotton was in that row; there appeared to be six or eight bales there. The bale of cotton on which the cinder fell was lying down on its side, on the oval side, and it had the other oval side up. The cinder struck on one of the oval sides of the bale, and bounded into a little depression that appeared to have been made by sampling the bale, and it rested there until I took it up in the presence of Mr. Pruitt. I took the cinder and the cotton it lay in up with my fingers. The piece of cotton here exhibited is the piece I took up with the cinder, and immediately underlying the cinder the cotton was scorched. The piece of cotton here exhibited is scorched where the cinder is lying in it. I have had this cinder in my possession practically all the time since I have been here in attendance upon the court. I think the small piece of the cinder has been broken off since I have been here. I think when it went out of my hands to counsel, the small piece by the side of it was attached to the main cinder. I picked up other cinders at the platform. The one you show me is another one I picked up there, and it was taken from another bale of cotton lying on the platform. I took up the fragment of cotton with it, and I took it off the bale of cotton upon which the cinder fell. I did not see this cinder fall, but the other one shown the jury I did see fall just as a train was passing. I took up other cinders there about the compress, and the ones you show me which are in an envelope are the identical ones picked up by me. Some of the cinders are smaller than when I picked them up, and they appear to have disintegrated and come to pieces. These cinders were picked up on the various days I was at the compress investigating the fire. I made on the envelope containing the first cinder concerning which I have testified, and the one picked up in the presence of Mr. Pruitt, the following memorandum: "Taken up in the presence of Mr.

J. M. Pruitt, cotton buyer, March 11, 1910." The memorandum was made right there on the spot at the time the cinder was taken up.

The two cinders first identified and testified about by the witness are introduced in evidence and exhibited to the jury.

I now in the presence of the jury measure with a rule the cinder picked up in the presence of Mr. Pruitt, and find the same to be 5/8 of an inch the long way, and the second cinder about which I have testified above I find upon measurement to be 3/4 of an inch in length and about 7-16 of an inch in width.

Cross examination by the Texas & Pacific Ry. Co.:

I am unable to say what day I found the larger cinder about which I have testified and which was found in a bale of cotton, but it was one of the five days I was at the compress making the investigation. The other one, the one picked up in the presence of Mr. Pruitt, was found on March 11, 1910. I made a memorandum of that one, but did not make a memorandum of the other one.

After the introduction of all the testimony above detailed by the witness Edwards relating to the cinders, the defendant Texas & Pacific Railway Company renewed its objections hereinbefore set out, and in addition thereto, made the objection that it is not asserted in the record or pleadings that the engines passing the compress at the time the cinders were picked up or after March 8, 1910, started the fire, but it is shown by the testimony of the plaintiff and the defendants that the fire, if started by an engine at all, was started by either No. 359, 140 or 202, and the testimony introduced has no relation to those engines and is not in rebuttal of anything offered by the plaintiff or the Texas & Pacific Railway Company, and it was not claimed in the original testimony that the engines which threw the cinders identified by the witness and about which he testified set the fire on March 8, 1910, but as a matter of fact they passed the compress subsequent to the fire. In con-

nection with the objections the defendant Texas & Pacific Railway Company moved the court to strike from the record the testimony objected to and instruct the jury not to consider the same. The court overruled the objections and motion of the Texas & Pacific aRilway Company, and permitted the testimony to remain with the jury for their consideration. To this action of the court the Texas & Pacific Railway Company in open court excepted, still now excepts and in this behalf tenders its bill of exception.

Re-direct examination:

The train which threw the cinder picked up in the presence of Mr. Pruitt was a freight train as well as I remember. The train was going westward. Do not remember definitely what time it passed the compress, but I believe it was some time between 11 and 12 o'clock.

Re-cross examination by the Texas & Pacific Ry. Co.:

I noticed sparks on the compress platform on quite a number of occasions. When I was not interviewing people in the neighborhood there, and especially after I had learned something about the time of the trains, I would go to the platform to see about the falling of cinders. I tried to watch every train that passed as near as I could. I know something of the manner in which a spark arrester in an engine is constructed. I have seen quite a number of them; I have seen them when I was looking up the causes of fires. I went to Marshall at the instance of Trezevant & Cochran who had companies interested in the fire. I do not believe they are interested in any of the companies involved in this suit. I believe it was through the courtesy of Mr. Crane that the companies involved in this suit obtained the benefit of my services. He allowed them to inspect the memoranda I had made. Possibly the insurance companies which have intervened in this case were in the same situation as those I represented. I know they had policies of insurance on the cotton now, but did not know it when I made the investigation. I was sent to Marshall to ascertain the facts

of the fire whichever way it went. I was not sent there to ascertain facts that did not concern the insurance companies. I went there to ascertain facts of interest to the insurance companies. Very often in investigating fires I have turned in reports favorable to the assured. I get at the facts no matter which way they cut. I tried to find evidence beneficial to the insurance companies; of course I would not reject evidence that would benefit them. I would report all evidence whether for or against the insurance companies. I did not report the result of my investigations to the assured, and I am under no obligation to the assured. I would report all evidence to the insurance companies. There was no contractural relation between me and the assured and I would not report to him. I do no know of any fact discovered by me that would innure to the benefit of the railroad company, but of course that would be a matter of opinion. I did not give any agent of the railroad the information that I found the cinders there. I expected to find a representative of the railroad there. They are generally there before I am. The public has not known of the matters about which I have testified at all as far as I am advised. It was not given out so the railroad could ascertain it until it was given on the witness stand. My relation with the insurance companies I took to be a confidential relation between attorney and client and I was not talking. I believe the bale of cotton in which I found the cinder on March 11 was about 10 feet from the south edge of the platform proper. The bale in which the cinder was was about half way between the southeast corner of the building and the southeast corner of the platform, not counting the narrow strip that runs further east. I delivered the cinders to the head of the adjusting department of the Trezevant & Cochran agency, Mr. Louve, and I was informed when I went in there Saturday morning that Mr. Crane had the papers, and later on I was informed by Mr. Crane that Mr. Thompson had them and I went down there and found them. The cinders were delivered to the adjuster about the 15th of March, 1910, and I did not see them any more until the 5th of Oc-

tober, 1912. If I had seen the cinders by themselves and not in connection with anyone who had them in possession I would not have recognized the smaller ones, but the large ones made a marked impression on me. The fact that the cinders were in an envelope and that envelope saled and endorsed by me, leads me to believe they are the same ones I picked up at the compress. I believe I handed the adjuster the package sealed and did not show him the cinders. My home is at Dallas, but I was at Sherman when called to come here as a witness. I have interviewed some negro witnesses since I have been here. My interview of them was in the interest of the insurance companies and assisting their attorneys.

Re-direct examination:

The railroad did not make me a written report of the investigation it made of the fire, and they did not report to me the result of their investigations.

Re-cross examination by Texas & Pacific Ry. Co.:

I mean to say that I submitted no report to the railroad company of my investigations and they submitted to me no report of their investigations of the fire.

The original petition in this case was filed November 15, 1911, and the intervention of the Home Insurance Company was filed on approximately the same date.

W. J. Rosborough, the plaintiff, being re-called by his own counsel, testified:

I had 770 bales of cotton at the compress, and agreed to sell Merryfield, Zeigler & Co. 760 bales. As far as my cotton book was concerned, this 760 bales had been separated from the remainder of the cotton, but in reality it had not been physically separated. Mr. Pruitt was there receiving the cotton at the time of the fire. Up to the fire he had received 280 bales. The agreed price was 14 7-10 cents per pound and I was to put the cotton in merchantable condition, and if this was not done, the buyers had the right to reject the cotton, and it was sold subject to inspection as to

condition. Merryfield, Zeigler & Co. paid me for the 280 bales of cotton which had been received by them and none of which were burned. I knew some of the cotton was damaged, but how much it was damaged I did not know. My estimate would be that the 770 bales of cotton was damaged to the extent of about four or five bales, or $350.00 in value.

Cross examination by the Compress Company:

I have put damaged cotton in condition, and my experience has been that the pickings of damaged cotton will not pay the expense of putting it in condition.

Cross examination by the Texas & Pacific Ry. Co.:

In talking to Merryfield, Zeigler & Co. over the telephone I did not know exactly how much cotton I had on hand and they agreed to take 760 bales at the price named. They said they would take up to 760 bales. I was paid $17,000.00 by the insurance companies. The damaged cotton taken from the bales would not be worth as much as good cotton.

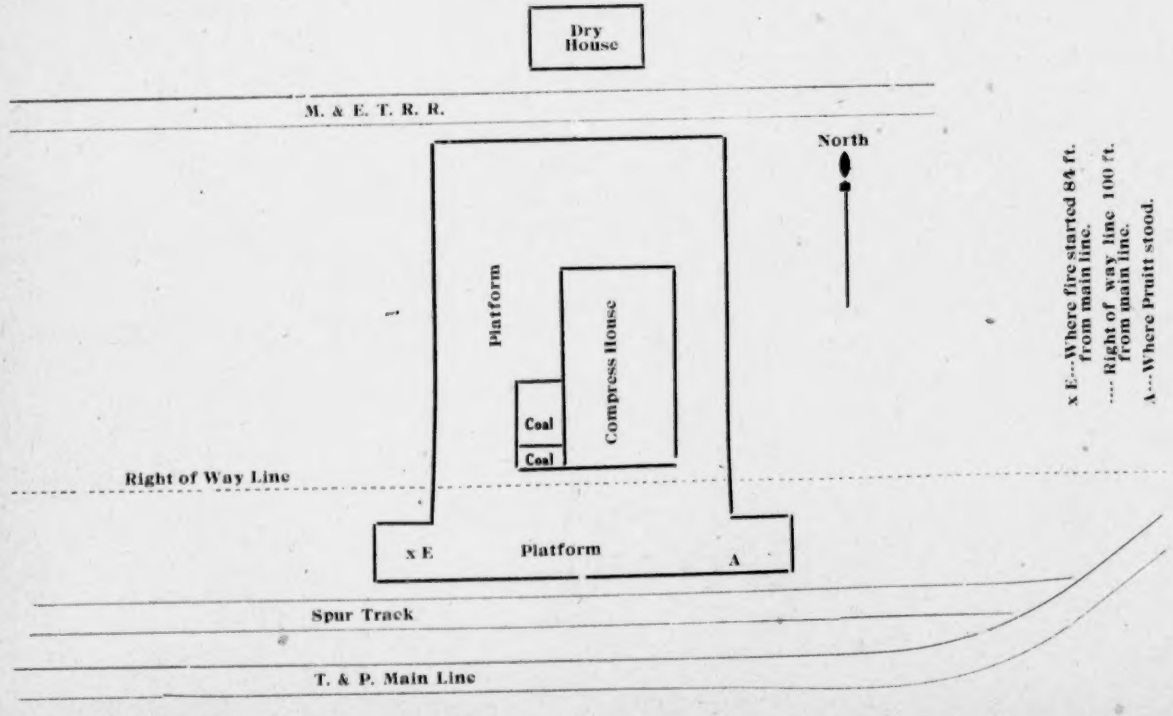
F. E. Rodiek also testified on cross examination:

I have here the record which was kept at Longview Junction at the time of the fire and for several weeks prior thereto, and for several weeks thereafter, and which shows a list of all repairs to all engines, and all defects of all engines running into and out of Longview. The first record of any defect in the spark arresters of any engine running from the east into Longview after the fire was two weeks thereafter and being engine No. ....

B. King also testified on cross examination:

I have the record of all inspections made of engines in the Marshall Round House and at the time of the fire and for several weks before and for several weeks after the fire, and there is no record of any defect of spark arresters on any engine running out of Marshall west for two weeks after the fire.

The suit was originally filed in the District Court of Har-


Dry House
M. & E. T. R. R.
North
Platform
Compress House
Coal
Coal
Right of Way Line
x E
Platform
A
Spur Track
T. & P. Main Line
x E---Where fire started 84 ft. from main line.
---- Right of way line 100 ft. from main line.
A---Where Pruitt stood.

rison County, Texas, on November 15, 1911, for $29,664.50, and in due time by petition and bond was removed by the Texas & Pacific Railway Company to the United States Circuit Court on the ground that said Railway Company was a federal corporation chartered by congress.

The parties all agreed that no cause of action had been proven against the Marshall & East Texas Railway Company.

The Marshall Compress Company filed several pleas and answers denying liability to any of the parties.

Said pleading not deemed important on this Writ of Error.

The plot referred to is as follows: (See page 112:)

CHARGE. (Delivered orally.)

Gentlemen of the Jury:

You have heard the evidence in the case and the argument, and it now becomes the duty of the court to instruct you as to the law which shall govern you, applying the facts in evidence to the instructions I will give you, and therefrom determine what nature of verdict you shall return.

When the case went to trial there were five parties to it, consisting of W. J. Rosborough, the plaintiff, and three defendants and a number of intervenors. The defendants were the Texas & Pacific Railway Company, the Marshall & East Texas Railway Company and the Marshall Compress Company, and the intervenors consisted of a number of insurance companies which claimed to have been subrogated by certain transactions which occurred between the plaintiff and themselves to a portion of whatever rights the jury might determine the plaintiff had in the subject matter of the controversy. Since the trial began the case has been simplified by the fact that the evidence fails to justify any finding against the Marshall & East Texas Railway Company, and the jury will therefore not consider that defendant in the case further than to return a verdict in its favor. As far as the intervenors, which consist of the various insurance companies that have appeared in the case, are concern-

ed, they will be entitled to recover only in the event you find the plaintiff is entitled to recover, and in that case, they would only be entitled to recover to the extent of the payments which they made to the plaintiff on the insurance policies on the cotton in controversy.

The plaintiff has brought the suit and alleged that he was the owner of certain cotton located about the premises of the Marshall Compress Company, and that that cotton was negligently destroyed by sparks or cinders or fire emitted from a locomotive engine of the Texas & Pacific Railway Company, and he asks that he be allowed to recover a verdict for the value of his cotton on account of its negligent destruction by the engine of the Texas & Pacific Railway Company, as I have just stated.

The plaintiff further alleges that the Marshall Compress Company was also guilty of negligence in placing the cotton in the position in which it was, and asks a recovery against the Marshall Compress Company as well as against the Texas & Pacific Railway Company.

The Texas & Pacific Railway Company has entered a general denial of all the allegations made by the plaintiff. It alleges that it had used ordinary care and had properly equipped and managed its engines, and that it was not guilty of any negligence which caused the damage to plaintiff, and that, if the plaintiff's cotton was destroyed, it was destroyed on account of his own negligence and the negligence of the Marshall Compress Company, which was acting as the plaintiff's agent, in exposing the cotton to danger on the occasion of its destruction.

The Marshall Compress Company denies any libility upon its part. It avers in its answer that the cotton was destroyed purely on account of the negligence of the Texas & Pacific Railway Company in the management and operation of its engines. It further says that if it did any act in reference to the cotton before the occasion of its destruction, it was merely a gratuitous bailee, and did not owe the plain-

tiff any such duty as would make it liable for the destruction of the cotton.

The insurance companies simply claim that under the contractural relations which they had with the plaintiff they had paid certain amounts on the insurance which plaintiff had on the cotton destroyed, and therefore should the plaintiff be found entitled to recover, they ought to be subrogated to his rights to the extent of the of the payments made by them.

Now, gentlemen, when you retire the pleadings in the case will be sent out with you in your retirement, and, if the jury see fit, you may read the pleadings, and gather from them a much fuller understanding of the issues than the court has attempted here to state. I make no pretense in this statement to you to detail every issue raised by all the parties to the suit, but it has been my purpose to state only a sufficiency of the issues as will enable the jury to understand the instructions on the law of the case which I will try to give you at length. One matter which it is proper for me to state to the jury in this connection is this: If you undertake to read the pleadings, and the pleadings are all the papers the parties file setting up the cause of action on behalf of the plaintiff and the defense on behalf of the defendant—the jury must not take the fact that any party has made an allegation in the pleadings as proof of that fact. The pleadings do not constitute the proof. They are but the vehicles through which the proof is admitted to the jury in the trial of the case. I think it proper to make that statement to the jury. You must understand that the facts must be established by the evidence of the witnesses and not by the mere fact that some party to the suit has made an allegation in the pleadings which you have with you in your retirement.

Now, gentlemen, in this case there is no controversy about the fact that plaintiff's cotton was destroyed on the occasion claimed by him, but the fact that the cotton was desroyed on the occasion stated and claimed by him will not authorize the plaintiff to recover. The plaintiff must prove

more than the fact that the cotton was destroyed by fire to entitle him to recover against the Texas & Pacific Railway Company. The burden will be upon him to show by a preponderance of the testimony that the cotton was destroyed by the escape of fire from a locomotive of the Texas & Pacific Railway Company, and that the railway company was guilty of negligence in permitting the fire to escape. I do not want to reiterate, but I want to let the jury understand thoroughly the issues in this case. In order to entitle the plainiff to recover he must show by preponderance of the evidence that his cotton was destroyed by fire which escaped from a locomotive of the Texas & Pacific Railway Company through the negligence of the railway company.

By "a preponderance of the evidence" is not meant the numerical strength of the witnesses one way or the other. When the court uses the term "by a preponderance of the evidence" I mean to say the greater weight and degree of credible evidence as the jury may find it in the case.

Now, if you find by a preponderance of the evidence that the fire which destroyed plaintiff's cotton was caused by sparks or cinders which escaped from a locomotive engine of the Texas & Pacific Railway Company, then from the proof of those facts, the jury may infer, if they see fit, that the railway company was guilty of negligence in permitting sparks or cinders to so escape from its locomotive, unless you find that the Texas & Pacific Railway Company used ordinary care to equip its engine which set out the fire with a spark arresting apparatus or appliance of approved pattern in use by careful and well managed railroad companies in this country, and that it used ordinary care to keep such spark arresting appliance in proper repair, and used ordinary care to have the engine which set out the fire carefully operated while passing the place where the cotton was situated.

The jury will observe that instructing you on the law of the case I have found it necessary to use the terms "negligence" and "ordinary care," and I will be compelled in instructing you further with reference to the liabilities and

rights of the parties to repeat these terms "negligence" and "ordinary care," and therefore I take occasion right at this point to give you the legal meaning of the terms "negligence" and "ordinary care," and wherever those terms are used in the charge I mean that the jury shall understand them in the light of the definitions which I shall now proceed to give.

Perhaps no better definition of negligence nor one more easily comprehended can be given than to say that negligence is the want of ordinary care, and it is the failure to exercise ordinary care.

"Ordinary care" is that degree of care which a person of ordinary prudence would have exercised under the circumstances of the situation, and it is necessary in considering the definition of ordinary care to understand that it is always to be measured and proportioned by the danger to be incurred at the time when the exercise of ordinary care is called for. It is just such care as a person of ordinary prudence at that particular time with those particular surroundings and circumstances would have exercised.

Now, if the jury find from a prepondenance of the evidence that on the occasion in question the bales of cotton belonging to the plaintiff situated on the premises of the Marshall Compress Company were destroyed by cinders or sparks or fire which escaped from a locomotive engine of the Texas & Pacific Railway Company, it would be the duty of the jury, if you so find the facts to be from a preponderance of the evidence, to return a verdict in favor of the plaintiff for the fair market value of the property so destroyed, with six per cent interest upon that value from the date of the destruction of the property by the fire, unless you should find otherwise under instructions which the court will now find it necessary to give to you.

A railway company is not required by the law to equip its engines and operate them so as to absolutely prevent the escape of fire. The law enjoins upon railway companies certain duties and certain liabilities, and the question for the jury to determine will be whether under the law as I

give it to you in charge as applied to the facts, the Texas & Pacific Railway Company has met those duties.

It is the duty of the railway company to equip its engines with spark arresting appliances of approved pattern in use by careful and well managed railroad companies in this country. It is further the duty of the railway company to keep its spark arresting appliances in proper repair. It is also the duty of the railway company to exercise ordinary care—I will correct the last statement: It is the duty of the railway company to exercise ordinary care to equip its engines with spark arresting appliances of approved pattern in use by careful and well managed railroad companies in this country. It is also the duty of the railway company to exercise ordinary care to keep such spark arresting appliances in proper condition and good repair. It is also the duty of the railway company to exercise ordinary care to have its engines carefully operated while passing the place where the cotton in question was situated.

Now, if the jury should determine from the testimony before you that the Texas & Pacific Railway Company exercised ordinary care to equip its engine which it is claimed set out the fire on the occasion in question, and which destroyed the plaintiff's cotton, with a spark arresting appliance of approved pattern in use by careful and well managed railroad companies in this country; and if you further find that the Texas & Pacific Railway Company exercised ordinary care to keep such appliances in proper repair and good condition; and if you further find from the evidence that the Texas & Pacific Railway Company exercised ordinary care to have its engine which it is claimed set out the fire carefully managed and operated while passing the place where the cotton in question was situated, then, in that event, you could not find a verdict against the Texas & Pacific Railway Company, even though you might find from the evidence that an engine of the Texas & Pacific Railway Company set out the fire which destroyed the plaintiff's cotton. Upon the other hand, if the jury find from a preponderanec of the evidence that an engine of the Texas &

Pacific Railway Company set out the fire which destroyed the plaintiff's cotton, and you fail to find that the Texas & Pacific Railway Company exercised ordinary care to equip its engine with a spark arresting appliance of approved pattern and in use by careful and well managed railroads in this country; or if you find that the Texas & Pacific Railway Company on the occasion in question failed to exercise ordinary care to keep such spark arresting appliance in proper condition and good repair; or if you find from the evidence that the Texas & Pacific Railway Company on the occasion in question failed to exercise ordinary care to have its engine carefully and properly operated while passing the place where the cotton was situated, and that such negligence on the part of the Texas & Pacific Railway Company as I have described to you was the proximate cause of the destruction of the plaintiff's cotton, in that event it would be your duty to return a verdict in favor of the plaintiff.

Now, in this connection, the Texas & Pacific Railway Company has plead that the plaintiff and the Marshall Compress Company were guilty of contributory negligence which was sufficient to defeat a recovery against the Texas & Pacific Railway Company.

"Contributory negligence" is some act of omission or commission upon the part of the plaintiff, or upon the part of the Marshall Compress Company, which contributed to produce the destruction of the cotton by fire. In this case the negligence of the Marshall Compress Company would be the negligence of the plaintiff so far as the liability of the Texas & Pacific Railway Company is concerned. In other words, if you find that the Marshall Compress Company did some act which was a negligent act, and which, concurring with some negligent act upon the part of the Texas & Pacific Railway Company, contributed to produce the destruction of the cotton in question, it would be as much a bar to the recovery of the plaintiff against the Texas & Pacific Railway Company as though the plaintiff, instead of the Marshall Compress Company, had committed the negligent act. There may be a state of facts about which the court will in-

struct you later under which the plaintiff would be entitled to recover against the Marshall Compress Company, though he would not be entitled to recover against the Texas & Pacific Railway Company. The court wishes you to understand here that as far as the issue of contributory negligence is concerned the negligence of the Compress Company would have the same effect to defeat a recovery against the Texas & Pacific Railway Company as would the negligence of the plaintiff himself.

In determining the question of negligence upon the part of the Texas & Pacific Railway Company in operating its engine and also in determining the question of contributory negligence upon the part of the plaintiff as well as upon the part of the Marshall Compress Company, the jury will consider all the facts which have been admitted in evidence before you. You may consider the proximity of the structure where the cotton was located to the track of the Texas & Pacific Railway Company. You may consider the condition of the grade at and near the point where the Marshall Compress Company had its platform, and from all those facts it will be the duty of the jury to determine whether the Texas & Pacific Railway Company at that point, considering the nature of the grade and the proximity of the platform of the Marshall Compress Company to the track of the Texas & Pacific Railway Company, was handling its engine upon the occasion in question with that degree of care which a person of ordinary prudence would have exercised under the circumstances of the situation; and it will also be the duty of the jury to consider the proximity of the place where the cotton was located to the railroad track, and also to give consideration to the nature of the grade at that place in determining whether knowing of the operation of the trains of the Texas & Pacific Railway Company at that place, and having a knowledge of the conditions existing there, the plaintiff was guilty of some act of negligence, or the compress was guilty of some act of negligence, in leav-

ing the cotton where it was and in the condition it was at the time the fire occurred.

Now, if the jury find from the evidenec that the plaintiff or the Marshall Compress Company failed to exercise ordinary care in any of the following particulars: First, if the plaintiff or the compress company failed to exercise ordinary care in placing the cotton where it was on the platform; or second; if you find from the evidence that the plaintiff or the compress company failed to exercise ordinary care in allowing the cotton to remain at the place where it was and in the condition that the evidence shows it to have been; or, third, if you find from the evidence that the plaintiff or the compress company failed to exercise ordinary care in having other cotton on the platform in proximity to the plaintiff's cotton; or, fourth, if you find that the plaintiff or the compress company failed to exercise ordinary care in permitting or allowing lint or loose cotton to accumulate at or near the place where the plaintiff's cotton was located—if in any of these particulars the jury should determine that the plaintiff or the compress company failed to exercise ordinary care, and that such failure to exercise such ordinary care upon the part of the plaintiff or the compress company, concurring with some act of negligence on the part of the railway company, produced the fire which destroyed the cotton of the plaintiff, then, in that event, the plaintiff would not be entitled to recover as against the Texas & Pacific Railway Company. In other words, in this case, if the plaintiff was guilty of an act of negligence which contributed to produce the injury of which he complains; or if the compress company was guilty of an act of negligence which contributed to produce the fire of which the plaintiff complains, in either event, the plaintiff would not be entitled to recover against the Texas & Pacific Railway Company.

If the jury should determine from the testimony that on the occasion of the fire the plaintiff did anything which a person of ordinary prudence would not have done under the circumstances of the situation; or if the jury should

determine that on the occasion of the fire the Marshall Compress Company did anything which a person of ordinary prudence would not have done under the circumstances of the situation, and that such act by the plaintiff or the compress company contributed to produce the fire which destroyed plaintiff's cotton, then the plaintiff could not recover against the Texas & Pacific Railway Company.

Furthermore, if the jury should determine from all the evidence in the case that the plaintiff omitted to do anything that a person of ordinary prudence would have done; or if you determine from the evidence that the Marshall Compress Company omitted to do anything which a person of ordinary prudence would have done, and that such omission upon the part of either the plaintiff or the Compress Company contributed to produce the fire which destroyed plaintiff's cotton, then in that event the plaintiff would not be entitled to recover against the Texas & Pacific Railway Company.

In passing upon the questions of negligence and contributory negligence as the court has given them to you in charge I desire to say to you that neither the plaintiff nor the Compress Company are required under the law to anticipate that the railway company would be negligent in the management or operation of its trains or the equipment of its engines.

If the jury should determine that a person of ordinary care and prudence would not have placed the cotton on the platform of the Compress Company where it was, or that a person of ordinary care and prudence would not have allowed it to remain in the position and condition it was on the platform, or that a person of ordinary care and prudence would not have permitted it to be surrounded as it was by other cotton on the platform—judging the whole question by what a person of ordinary prudence would have done under the circumstances, in that event the doing of those things which a person of ordinary prudence would not have done would constitute contributory negligence on the part of either the plaintiff or the Compress Company which would

defeat the recovery of the plaintiff against the Texas & Pacific Railway Company. While that is true, the plaintiff nor the Compress Company were not required to anticipate that the railway company would improperly equip its engines, or fail to exercise ordinary care to do so, or fail to exercise ordinary care to keep such equipment in proper repair and condition or fail to exercise ordinary care in handling and operating its engine. In other words, they were not required to anticipate the negligence of the Texas & Pacific Railway Company; but if the Texas & Pacific Railway Company had its engines properly equipped with spark arresting appliances, and had such appliances in a good state of repair and proper condition, and operated its engine in a careful manner, and the plaintiff was negligent, or the Compress Company was negligent in placing the cotton where it was, or suffering it to be surrounded by lots of loose cotton, and if you find that such negligence of the plaintiff or the Compress Company contributed to produce the destruction of plaintiff's cotton, in that event plaintiff would not be entitled to recover.

Now, the pleadings in the case raise another issue which the court finds it necessary to submit to you. If the jury should determine from the evidence in this case that the plaintiff's cotton was destroyed by fire set out by an engine of the Texas & Pacific Railway Company; but you find that the railway company exercised ordinary care to properly equip its engine with a spark arresting appliance of the character described to you in a former part of the charge, and exercised ordinary care to keep such spark arresting appliance in proper repair and good condition, and exercised ordinary care to properly handle its engine in passing the place where the cotton was situated, in that state of case you could not find a verdict against the Texas & Pacific Railway Company; yet, if you find that the Compress Company, in the manner in which it located plaintiff's cotton, or the condition in which it permitted the cotton to remain, was guilty of an act of negligence on its part—that is, a failure on its part to exercise ordinary care which proximately

and directly contributed to produce the destruction of plaintiff's cotton, then, in that event, while you could not find against the Texas & Pacific Railway Company, it would be your duty to return a verdict in favor of the plaintiff against the Marshall Compress Company.

Upon the other hand, if the jury should determine from the evidence that an engine of the Texas & Pacific Railway Company set out the fire which destroyed plaintiff's cotton, but you fail to find that the Texas & Pacific Railway Company was guilty of negligence as the same has been defined to you in this charge, and you fail to find by a preponderance of the testimony that the Compress Company was guilty of an act of negligence which made it liable under the instructions heretofore given, in that event it would be your duty to return a verdict against the plaintiff as to all defendants.

If you find for the plaintiff, the measure of damages will be the fair market value of the cotton destroyed by fire at the time and place of its destruction, together with six per cent interest on such ascertained value from the date of the destruction of the cotton to the date of the return of your verdict.

If you find for the plaintiff, the form of your verdict may be: "We, the jury, find for the plaintiff, and assess his damages at ..... dollars," stating the amount of damages you assess, and specifying the defendant or defendants against whom you may find, and you will also add to your verdict after making the calculation the interest you find on the amount of damages you return. You may also state, should you find for the plaintiff, and, "We also find for the intervenors the sum of ..... dollars," filling in the sum you find for the intervenors, which in no event shall be more than the amount of money the insurance companies have paid the plaintiff.

You are the exclusive judges of the facts, of the credibility of the witnesses, the weight to be given their testimony and all the facts and circumstances in evidence. As

to the law, it is your duty to be governed by the instructions given you by the court.

Mr. Prendergast for the Texas & Pacific Railway Company: The defendant Texas & Pacific Ry. Co. excepts to that portion of the charge in which the court tells the jury that if they FAIL to find that sparks from defendant's engine set the fire, then they would find for the plaintiff, unless they find that we had our engines properly equipped with spark arresters and kept them in good repair and operated our engine carefully, and we except to that charge being given at all because there is no evidence that will sustain a finding that we failed to operate the engine carefully. There may be evidence about the other matters, but it is repeated three times and there is no evidence that we failed to operate the engine carefully.

We also except to the refusal to give our special charges.

Mr. Edwards: The Marshall Compress Company excepts to the refusal to give its requested special charges.

It excepts to the court's main charge because it submitted to the jury the issue whether the Marshall Compress Company was guilty of negligence in permitting the cotton that was destroyed to be surrounded by loose cotton, and whether such negligence, if any there was, was the proximate couse of the fire. The grounds of our exception are that there is no evidence tending to show that there was any loose cotton surrounding or in the vicinity of the place where the fire started, or, if there was any loose cotton on the platform, that it started the fire, and no evidence tending to show that it did cause the fire.

We except on the further ground that the charge made ordinary care the measure of the duty of the compress company to the plaintiff, whereas the compress company owed the plaintiff only the exercise of slight care.

The Court: In delivering the charge to the jury orally I endeavered to make the jury understand my meaning, but Judge Prendergast has called my attention to the fact that in one place I stated "if the jury fail to find," when I should

have said if you find the company failed to do so and so. In the event the jury find from a preponderance of the evidence that an engine of the Texas & Pacific Railway Company set out the fire which destroyed plaintiff's cotton, and you should find that the company had failed to exercise ordinary care to properly equip its engines with the necessary spark arresters, as I have described in the charge; or if you find that it failed to exercise ordinary care to keep such spark arresting appliances in proper repair and good condition; or if you find that the railway company failed to exercise ordinary care to carefully handle and operate its engines on the occasion in question, in either of those events, you would be justified in returning a verdict in favor of the plaintiff.

The defendant, the Texas & Pacific Railway Company, thereupon requested the court to give to the jury each of the following special instructions. The court refused to give said special instructions and thereupon the Texas & Pacific Railway Company then and there excepted to the refusal to give each said special instructions, as follows:

First.

It appears that the place where the fire started was on the right-of-way of the Railway Company.

And there is no evidence that the Railway Company had any control of the cotton.

Therefore the fact that the cotton was on the right-of-way resulted in its being burned.

Therefore the Railway Company is not liable.

Second.

If the jury believes from the evidence that sparks from a Texas & Pacific Railway engine set the cotton on fire, still that company would not be liable for the destruction of the cotton if the Compress Company failed to use ordinary care to protect said cotton from sparks from the railway engine, and in determining whether the Compress Company was negligent may consider the known combustibility of cotton when baled or loose, and exposed without covering of bagging, and its proximity to the railroad, and that it

was on the side of an ascending grade on the railroad, where more sparks are thrown than on level ground.

Third.

If you believe that a portion of the platform of the Compress Company was on the right-of-way of the Texas & Pacific Railway Company, and you believe that the railway permitted the use by the Compress Company that part of the platform on its right-of-way for the purpose of loading and unloading cotton on or from said cars, but the railway had not agreed to the use of that part of the platform by the Compress Company for the purpose of storing cotton, and if you find that the cotton where the fire started was on the railway right-of-way then the railway would not be liable.

Fourth.

It appears in the case that plaintiff Rosborough delivered the cotton to the Marshall Compress Company, and the Compress Company placed said cotton on the platform, not covered by any roof and not covered at all except to the extent that you find the bales may have been covered by bagging.

Now if a person of ordinary prudence would not have placed the cotton there, and the cotton being there was a proximate cause which concurring with the negligence of the railway, (if the railway was negligent) caused it to be burned, then plaintiff can not recover even though you find the railway was negligent, and no matter how negligent you find the railway to have been.

Fifth.

Gentlemen of the Jury:

You are instructed that the defendant, the Texas & Pacific Railway Company was not under the duty to so equip its locomotives and operate them as to absolutely prevent the escape of sparks which might set out fire, and although if you should find from the evidence that the fire complained of was caused by sparks from one of its engines, still, if you further believe from the evidence that whatever locomotive the sparks, if any, came from was equipped with

what is known as a spark arresting appliance, and that said company had exercised ordinary care to equip same with one of the best appliances of the kind in general use on railroads in this country, and was in the exercise of ordinary care to keep the same in repair, and that at the time complained of the locomotive was being operated with ordinary care so as not to cause it to throw any sparks that would result in the necessary use of said locomotive for the purpose it was being used at the time, then it will be your duty to find for the defendant, the Texas & Pacific Railway Company, and you will return a verdict accordingly.

Sixth.

Gentlemen of the Jury:

You are instructed that if you believe from the evidence that the plaintiff, W. J. Rosborough, caused his cotton to be placed with the Marshall Compress Company at its compress and that at the time of the fire complained of and prior thereto, said Compress Company had the custody or care of said cotton for said plaintiff, and if you believe from the evidence that said Compress Company had other cotton at its compress and that plaintiff's cotton and said other cotton was on its platform at its compress and that said compress company either caused or permitted any of the plaintiff's cotton, or any other cotton, which it had at its compress to be placed out on an open platform so close to the railroad as to render it in danger of catching fire from sparks coming from a passing locomotive; or if you believe it permitted or left loose cotton on or over its platform or left bales of cotton exposed with the top ends uncovered, which was likely to catch fire from sparks coming from a passing locomotive, and if you believe that the acts, if any, or omissions, if any, on the part of said Compress Company in relation to said cotton, was such as a person of ordinary prudence would not have done or left undone in view of the probable danger of fire from passing locomotives, if such danger was probable, and if you further believe that such acts, if any, or omissions, if any, contributed to cause said cotton to catch fire, and that said fire destroyed the cotton

involved in this suit, then you will find for the defendant, although you may believe from the evidence that the defendant was also guilty of negligence but for which fire would not have occurred.

After hearing the argument and the charge of the court the jury retired and returned into open court the verdict in favor of plaintiff and intervenor, the Insurance Company, against the Texas & Pacific Railway Company, which verdict is in the following words and figures:

"We the jury find verdict for the plaintiff W. J. Rosborough and the intervenors against the defendant the Texas & Pacific Railway Company for amount sued for, Twenty Nine Thousand Six Hundred and Sixty-Four Dollars and Fifty Cents, with six per cent from March 8, 1910, to October 15, 1912, amounting to four thousand six hundred and thirty-two dollars and fifty-six cents. Of which amount so found in favor of plaintiff and intervenors, we find for intervenors as follows:

North British & Mercantile Company	$1948.52
Phoenix Insurance Company of Hartford	565.29
Firemans Fund Insurance Company	565.29
Aetna Insurance Company	3110.12
Citizens Insurance Company of Missouri	2826.49
Boston Insurance Company	282.64
Springfield Fire & Marine Insurance Company	1130.58
Royal Insurance Company	1130.58
German American Insurance Company	565.29
Continental Insurance Company	565.29
Milwaukee & Mechanics Insurance Company	1130.58
Queen Insurance Company	1130.58
Fidelity Fire Insurance Company	565.29
Insurance Company of North America	565.29
Hamburg Bremen Insurance Company	282.64
Phoenix Insurance Company of Brooklyn	1130.58
Home Insurance Company	1110.00

S. G. GRANDBERRY,
Foreman.

The court ordered a stay of execution for forty-two days

to permit the Texas & Pacific Railway Company to file its petition for a new trial, and thereafter in due time and by agreement of the parties the hearing of said motion was continued until the 11th day of January, 1913, and on the 11th day of January, 1913, the court ordered a motion for a new trial to be filed, and the further consideration of said motion was continued over to be finally heard at the next session of court at Jefferson, which met on the 17th day of February, 1913, and at said term of court on February 27, 1913, the court overruled said motion and thereupon the court granted the Texas & Pacific Railway Company until the 10th day of April,1913, to prepare a bill of exceptions in order to obtain a Writ of Error, and execution is further stayed by agreement of the parties until that date.

On February 27, 1913, the court on motion of the plaintiff changed and corrected the judgment in certain particulars changing the amounts that the plaintiff and the various intervenors should recover leaving the total amount recovered the same as it was. The defendant the Texas & Pacific Railway Company, objected to any judgment being rendered on the verdict because the verdict did not dispose of the cause as between the plaintiff and intervenors on the one hand and the Compress Company on the other and did not dispose of the cause as between the Texas & Pacific Railway Company on the one hand and the Marshall Compress on the other, these objections were presented at the same time with the motion of the Texas & Pacific Railway Company for a new trial and were overruled by the court and the Texas & Pacific Railway Company excepted to said ruling of the court and now tenders this its bill of exceptions covering the whole cause and prays the same be allowed.

Which is accordingly done on this April 5, 1913.

GORDON RUSSELL, Judge.

The foregoing is correct.

S. P. JONES, Attorney.

Endorsed filed April 8, 1913, United States District Court Eastern District of Texas, Jefferson, Texas.

APPLICATION FOR WRIT OF ERROR AND ASSIGNMENT OF ERRORS.

In the United States District Court of Texas at Texarkana, **Texas.**

W. J. ROSBOROUGH,

vs.

TEXAS & PACIFIC RAILWAY COMPANY ET AL.

To the Honorable Gordon Russell, Judge of said Court:

Now comes the defendant the Texas & Pacific Railway Company and shows to the Court that in the trial and proceedings and in the judgment rendered in the above cause error hath intervened to the damage to the Texas & Pacific Railway Company, and is explained by the following assignment of errors.

First.

The Court erred in admitting the evidence of C. L. Edwards, witness for the plaintiff, said evidence being in substance as follows:

"I came to Marshall a day or two after the fire that destroyed the cotton, the value of which is involved in this suit. I came to Marshall as the representative for the Insurance Companies which had isued policies for fire insurance covering said cotton. The fire was on the 8th day of March, and I came on the night of the ninth (9) of March, and was at the compress on the platform, near where the cotton was burned on March 11th and other days after the 11th.

"I watched trains passing on the Texas & Pacific Railway more or less during the days during my stay, this was in the day time and I couldn't well see sparks from the engines, but quite a number of cinders fell and I gathered up a great many of the cinders I saw fall. I have a cinder here embedded in a piece of cotton. I saw it fall and took the cinder up immediately after it fell. This cinder fell on a bale of cotton to the eastward of the compress building on the platform, there was a bale of cotton on the platform lying on its side with the oval side up, the cinder struck on the oval side of the bale and bounded into a little depression

that appeared to have been made in sampling the bale of cotton and remained there until I took it up. I took up the cinder with some of the cotton under it, which cotton was scorched. I picked up other cinders on the platform. I saw this cinder fall just as the train was passing.

"I took up other cinders there. This cinder by actual measurement is 5/8 of an inch the long way, the other is 3/4 of an inch long and 7-16 of an inch wide. I saw these cinders fall one of the five days I was at the compress after the fire, making the investigation, the other one I saw fall on March 11, 1910."

The admission of this evidence was error for the following reasons:

1. Because the same was offered after the plaintiff had once closed his case and after the defendant had introduced its evidence and closed its case, and said evidence was not in rebuttal of any evidence introduced by defendant.

2. Because the engine that started the fire had been identified by the evidence as being the switch engine No. 140 or the freight engine No. 202, or the passenger engine No. 359, and said testimony offered had no relation to the condition of either of those engines, and it is not claimed that either of the engines seen by the witness to pass the compress after the fire was the engine that set the cotton on fire. These objections were made when the evidence was offered.

Second.

The Court erred in rendering judgment on the verdict returned by the jury ,because said verdict is not sufficient to sustain the judgment in that there was no finding disposing of the cause as to the defendant the Marshall Compress Company, and the plaintiff had set up in his pleading a cause of action against both the Railway Company and the Compress Company, and the Railway Company plead that the Compress was negligent which caused the cotton to be burned.

Third.

The Court erred in refusing the following instructions requested by the defendant:

It appears that the place where the fire was on the right-of-way of the railway company.

And there is no evidence that the railway company had any control of the cotton.

Therefore the fact that the cotton was on the right-of-way resulted in its being burned.

Therefore the railway company is not liable.

Fourth.

The Court erred in refusing the following instructions requested by the defendant:

If the jury believe from the evidence that sparks from a Texas & Pacific Railway engine set the cotton on fire, still that company would not be liable for the destruction of the cotton if the Compress Company failed to use ordinary care to protect said cotton from sparks from the railway engine, and in determining whether the Compress Company was negligent may consider the known combustibility of cotton when baled or loose, and exposed without covering of bagging, and its proximity to the railroad, and that it was on the side of an ascending grade on the railroad, where more sparks are thrown than on level ground.

Fifth.

The Court erred in refusing the following instructions requested by the defendant:

If you believe that a portion of the platform of the Compress Company was on the right-of-way of the Texas & Pacific Railway Company, and you believe that the railway permitted the use by the Compress Company of that part of the platform on its right-of-way for the purpose of loading and unloading on or from said cars, but the railway had not agreed to the use of that part of the platform by the Compress Company for the purpose of storing cotton and if you find that the cotton where the fire started was on the railway right-of-way then the railway would not be liable.

Sixth.

The Court erred in refusing the following instruction requested by the defendant:

It appears in the case that plaintiff Rosborough delivered the cotton to the Marshall Compress Company, and the Compress Company placed said cotton on the platform, not covered by any roof and not covered at all except to the extent that you find the bales may have been covered by bagging.

Now if a person of ordinary prudence would not have placed the cotton there, and the cotton being there was a proximate cause which concurring with the negligence of the railway (if the railway was negligent) caused it to be burned, then plaintiff can not recover even though you find the railway was negligent, and no matter how negligent you find the railway to have been.

Seventh.

The Court erred in refusing the following instructions requested by the defendant:

Gentlemen of the Jury:

You are instructed that the defendant, the Texas & Pacific Railway Company, was not under the duty to so equip its locomotives and operate them as to absolutely prevent the escape of sparks which might send out fire, and although if you should find from the evidence that the fire complained of was caused by sparks from one of its engines, still, if you further believe from the evidence that whatever locomotive the sparks, if any, came from was equipped with what is known as a spark arresting appliance, and that said company had exercised ordinary care to equip same with one of the best appliances of the kind in general use on railroads in this country, and was in the exercise of ordinary care to keep the same in repair, and that at the time complained of the locomotive was being operated with ordinary care so as not to cause it to throw any more sparks than would result in the necessary use of said locomotive for the purposes it was being used at the time, then it will be your

duty to find for the defendant, the Texas & Pacific Railway Company.

Eighth.

The Court erred in refusing the following instructions requested by the defendant:

Gentlemen of the Jury:

You are instructed that if you believe from the evidence that the plaintiff, W. J. Rosborough, caused his cotton to be placed with the Marshall Compress Company at its compress and that at the time of the fire complained of and prior thereto, said Compress Company had the custody or care of said cotton for said plaintiff, and if you believe from the evidence that said Compress Company had other cotton at its compress and that plaintiff's cotton and said other cotton was on its platform at its compress and that said compress company either caused or permitted any of the plaintiff's cotton, or any other cotton, which it had at its compress to be placed out on an open platform so close to the railroad as to render it in danger of catching fire from sparks coming from a passing locomotive; or if you believe it permitted or left loose cotton on or over its platform or left bales of cotton exposed with the top ends uncovered, which was likely to catch fire from sparks coming from a passing locomotive, and if you believe that the acts, if any, or omissions, if any, on the part of said Compress Company in relation to said cotton, was such as a person of ordinary prudence would not have done or left undone in view of the probable danger of fire from passing locomotives, if such danger was probable, and if you further believe that such acts, if any, or omissions, if any, contributed to cause said cotton to catch fire, and that said fire destroyed the cotton involved in this suit, then you will find for the defendant, although you may believe from the evidence that the defendant was also guilty of negligence but for which fire would not have occurred.

The Texas & Pacific Railway Company desires to remove said cause by Writ of Error to the United States Circuit Court of Appeals of the Fifth Circuit, and he has given no-

tice of this application for Writ of Error to his co-defendants, the Marshall & East Texas Railway Company and the Marshall Compress Company, and they have each declined to join his appeal, and he exhibits here to the Court their written declination.

Wherefore he prays that he be granted a Writ of Error in the above cause to remove the same to the United States Circuit Court of Appeals of the Fifth Circuit to have the proceedings and judgment herein reviewed, revised and corrected, and he prays for an order allowing the Texas & Pacific Railway Company to take this Writ of Error without joining his co-defendants.

F. H. PRENDERGAST,
Attorney for Plaintiff in Error.

The above application for Writ of Error and Assignment of Error has been presented to me and it is made known to me that the Marshall & East Texas Railway Company, defendants in the above cause, and the Marshall Compress Company, defendants in the above cause, have been notified of this application and they have each declined to join in the Writ of Error, therefore, the abeve application of the Texas & Pacific Railway Company for Writ of Error is granted. The said Texas & Pacific Railway Company is permitted to sue out this Writ of Error without joining the Marshall & East Texas Railway Company and the Marshall Compress Company.

April 5, 1913. Signed,

GORDON RUSSELL, Judge.

Endorsed filed April 8, 1913, in the United States District Court Eastern District of Texas, at Jefferson, Texas.

BOND ON WRIT OF ERROR.

In the District Court of the United States for the Eastern District of Texas at Jefferson.

W. J. ROSBOROUGH,

vs.

THE TEXAS & PACIFIC RAILWAY COMPANY.

Know All Men by These Presents: That we, the Texas &

Pacific Railway Company, a corporation duly incorporated and organized under and by virtue of an Act of Congress of the United States, as principal and .....
..... as sureties, are held and firmly bound unto W. J. Rosborough and the North British & Mercantile Company, Phoenix Insurance Company of Hartford, Firemans Fund Insurance Company, Aetna Insurance Company, Citizens Insurance Company of Missouri, Boston Insurance Company, Springfield Fire & Marine Insurance Company, Royal Insurance Company, German American Insurance Company, Continental Insurance Company, Milwaukee & Mechanics Insurance Company Queen Insurance Company, Fidelity Fire Insurance Company, Insurance Company of North America, Hamburg Bremen Insurance Company, Phenix Insurance Company of Brooklyn, Home Insurance Company, in the sum of Forty Thousand Dollars, to be paid to the said W. J. Rosborough and Insurance Companies named above, their executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents, sealed with our seal, using scrolls for seals, and signed with our name, this the .... day of March, 1913.

The condition of the foregoing bond is such, that, whereas, lately at a term of the District Court of the United States, for the Eastern District of Texas, at Jefferson in a suit pending in said Court, between W. J. Rosborough plaintiff, and North British & Mercantile Company, Proenix Insurance Company of Hartford, Firemans Fund Insurance Company, Aetna Insurance Company, Citizens Insurance Company of Missouri, Boston Insurance Company, Springfield Fire & Marine Insurance Company, Royal Insurance Company, German American Insurance Company, Continental Insurance Company, Milwaukee & Mechanics Insurance Company, Queen Insurance Company, Fidelity Fire Insurance Company, Insurance Company of North America, Hamburg Bremen Insurance Company, Phenix Insurance Company of Brooklyn, Home Insurance Company, interven-

ors, and the Texas & Pacific Railway Company and Marshall Compress Company, defendants, numbered ..... on the docket of said Court, a judgment was rendered on the 15th day of October, 1912, that the plaintiff, W. J. Rosborough, and intervenors, North British & Mercantile Company, Phoenix Insurance Company of Hartford, Firemans Fund Insurance Company, Aetna Insurance Company, Citizens Insurance Company of Missouri, Boston Insurance Company, Springfield Fire & Marine Insurance Company, Royal Insurance Company, German American Insurance Company, Continental Insurance Company, Milwaukee & Mechanics Insurance Company, Queen Insurance Company, Fidelity Fire Insurance Company, Insurance Company of North America, Hamburg Bremen Insurance Company, Phenix Insurance Company of Brooklyn, Home Insurance Company, should have and recover of the defendant the sum of Thirty-four Thousand Two Hundred and Ninety-Seven Dollars and Six Cents, with six per cent per annum thereon from date of rendition, as well as all costs of suit; which judgment was corrected February 27, 1913; and whereas;

Said the Texas & Pacific Railway Company has obtained a writ of error, and has filed a copy thereof in the office of the clerk of said court to reverse said judgment, and also a citation directed to said W. J. Rosborough and intervenors, North British & Mercantile Company, Phoenix Insurance Company of Hartford, Firemans Fund Insurance Company, Aetna Insurance Company, Citizens Insurance Company of Missouri, Boston Insurance Company, Springfield Fire & Marine Insurance Company, Royal Insurance Company, German American Insurance Company, Continental Insurance Company, Milwaukee & Mechanics Insurance Company, Queen Insurance Company, Fidelity Fire Insurance Company, Insurance Company of North America, Hamburg Bremen Insurance Company, Phenix Insurance Company of Brooklyn Home Insurance Company, Marshall Compress Company and Marshall & East Texas Railway Company and their attorneys, of record S. P. Jones, T. W. Davidson and P. O. Beard and J. R. Warren citing and admonishing them to be

and appear at the United States Circuit Court of Appeals, for the Fifth Circuit, to be holden at New Orleans, Louisiana, within thirty days from the date thereof.

Now, if the said the Texas & Pacific Railway Company shall prosecute its writ of error to effect, and answer all damages and costs, if it fail to make good its plea, then the above obligations to be void, else to remain in full force and virtue.

THE TEXAS & PACIFIC RAILWAY CO. (Seal)
By F. H. PRENDERGAST, Agent.
J. H. ARDREY. (Seal)
E. R. BUDDY. (Seal)

Approved: GORDON RUSSELL, Judge.

CLERK'S CERTIFICATE.

In the District Court of the United States for the Eastern District of Texas, at Jefferson.

No. 582.

I, J. R. Blades, Clerk of the District Court of the United States for the Eastern District of Texas, at Jefferson, do hereby certify that the foregoing and attached papers of manuscript numbered in the margin of said pages (from 1 to ..... both inclusive) contain a full, true and correct copy of the record, bill of exception, assignment of error, and all of the proceedings in the cause No. 582, wherein The Texas & Pacific Railway Company are plaintiffs, and W. J. Rosborough and intervenors, Home Insurance Company, North British & Mercantile Company, Phoenix Insurance Company of Hartford, Firemans Fund Insurance Company, Aetna Insurance Company, Citizens Insurance Company of Missouri, Boston Insurance Company, Springfield Fire and Insurance Company, Royal Insurance Company, German American Insurance Company, Continental Insurance Company, Milwaukee Mechanics Insurance Company, Queen Insurance Company, Insurance Company of North America, Hamburg Bremen Insurance Company and Phenix Insurance Company of Brooklyn, are defendants, except that the original writ of error and citation in error are included therein, instead of copies thereof, as fully as the same remains on file and record in my office at Jefferson, Texas.

In testimony whereof I hereunto set my hand and affix the seal of the District Court of the United States of America, for the Eastern District of Texas, at Jefferson, at my office in said City of Jefferson, this the 21st day of May, A. D. 1913.

J. R. BLADES,
Clerk of the United States District Court, Eastern District of Texas, at Jefferson, Texas.

By W. E. SINGLETON, JR.,
Deputy.

That thereafter, the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

Argument in Part and Continuance.

Extract from the Minutes of November 13, 1913.

No. 2520.

TEXAS & PACIFIC RAILWAY COMPANY
versus
W. J. ROSBOROUGH et al.

On this day this cause was called, and, after argument by F. H. Prendergast, Esq., for Plaintiff in Error, and P. O. Beard, Esq., and S. P. Jones, Esq., for Defendants in Error, was continued until Friday, November 14th, 1913, at eleven o'clock A. M. for further argument.

Continued Argument and Submission.

Extract from the Minutes of November 14, 1913.

No. 2520.

TEXAS & PACIFIC RAILWAY COMPANY
versus
W. J. ROSBOROUGH et al.

On this day this cause was called for further hearing, and, after argument by John J. King, Esq., for Plaintiff in Error, was submitted to the Court.

Opinion of the Court.

Filed December 9th, 1913.

United States Circuit Court of Appeals, Fifth Circuit.

No. 2520.

TEXAS & PACIFIC RAILWAY COMPANY
versus
W. J. ROSBOROUGH et al.

Error to the United States District Court for the Eastern District of Texas.

Before Pardee and Shelby, Circuit Judges, and Call, District Judge.

By the COURT:

Under the issues presented by the 5th and 7th paragraphs of the first amended answer of the Texas & Pacific Railway Company, the

evidence of Edwards set forth and complained of in the first assignment of error was admissible on behalf of the plaintiff. Its admission over objection after plaintiff "had rested" and after the defending railway company had offered perhaps all of its evidence, was within the discretion of the trial Judge. Ency. Pl. & Pr., Vol. 8, p. 132.

Under the issues made by the pleadings and considering the evidence offered by the defendant more or less tending to show that its locomotives were all equipped with a standard spark arrester kept in order and well handled, the evidence of Edwards complained of was not irrelevant nor immaterial. That it was somewhat remote goes to its effect. Because the evidence of the defendant showed that the fire was started by one of three certain engines, numbers 359, 140 and 202, and Edwards' evidence related to the action and the handling of another and different engine two days after the fire did not warrant striking the evidence of Edwards from the record.

All issues in the case affecting the railway company's liability were for the jury and the jury was not bound to accept the explanation tendered by the evidence of the railway company as to which particular engine started the fire and how that engine was equipped and handled.

None of the other assignments of error were much insisted upon, and from examination we find none of them well taken.

The judgment of the District Court is affirmed.

Judgment.

Extract from the Minutes of December 9, 1913.

No. 2520.

TEXAS & PACIFIC RAILWAY COMPANY
versus
W. J. ROSBOROUGH et al.

This cause came on to be heard on the transcript of the record from the District Court of the United States, for the Eastern District of Texas, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause, be, and the same is hereby, affirmed;

It is further ordered and adjudged that the plaintiff in error, the Texas & Pacific Railway Company, and the sureties on the writ of error bond herein, J. H. Ardrey and E. R. Buddy, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of said District Court.

Assignment of Errors, Petition for Writ of Error, and Order Allowing Writ of Error.

Filed January 22nd, 1914.

In the United States Circuit Court of Appeals, Fifth Circuit.

TEXAS AND PACIFIC RAILWAY COMPANY
vs.
W. J. ROSBOROUGH et al.

To the Honorable the Supreme Court of the United States:

Now comes the Texas & Pacific Railway Company and shows to the Court that in the trial and proceedings and in the judgment rendered in the above cause, in the United States Circuit Court of Appeals, of the Fifth Circuit, on December 9th, 1913, error has intervened to the damage of the Texas & Pacific Railway Company, as is shown by the following assignment of errors.

First.

The Court erred in not sustaining the first assigned error which is as follows:

The Court erred in admitting the evidence of C. L. Edwards, witness for the plaintiff, said evidence being in substance as follows:

"I came to Marshall a day or two after the fire that destroyed the cotton, the value of which is involved in this suit. I came to Marshall as the representative for the Insurance Companies which had issued policies for fire insurance covering said cotton. The fire was on the 8th day of March, and I came on the night of the ninth (9) of March, and was at the Compress on the platform, near where the cotton was burned on March 11th, and other days after the 11th.

"I watched trains passing on the Texas & Pacific Railway more or less during the days during my stay, this was in the day time and I couldn't well see sparks from the engines, but quite a number of cinders fell and I gathered up a great many of the cinders I saw fall. I have a cinder here imbedded in a piece of cotton. I saw it fall and took the cinder up immediately after it fell. This cinder fell on a bale of cotton to the eastward of the compress building on on the platform, there was a bale of cotton on the platform lying on its side with the oval side up, the cinder struck on the oval side of the bale and bounded into a little depression that appeared to have been made in sampling the bale of cotton and remained there until I took it up. I took up the cinder with some of the cotton under it, which cotton was scorched. I picked up other cinders on the platform. I saw this cinder fall just as the train was passing.

"I took up other cinders. This cinder by actual measurement is 5/8 of an inch the long way, the other is 3/4 of an inch long and 7-16 of an inch wide. I saw these cinders fall one of the five days I was at the compress after the fire, making the investigation, the other one I saw fall on March 11, 1910."

The admission of this evidence was error for the following reasons:

1. Because the same was offered after the plaintiff had once closed his case and after the defendant had introduced its evidence and closed its case, and said evidence was not in rebuttal of any evidence introduced by defendant.

2. Because the engine that started the fire had been identified by the evidence as being the switch engine No. 140 or the freight engine No. 202, or the passenger engine No. 359, and said testimony offered had no relation to the condition of either of those engines, and it is not claimed that either of the engines seen by the witness to pass the compress after the fire was the engine that set the cotton on fire. These objections were made when the evidence was offered.

Second.

The court erred in not sustaining the third assigned error, which is as follows:

The Court erred in refusing the following instructions requested by the defendant:

It appears that the place where the fire — was on the right-of-way of the railway company.

And there is no evidence that the railway company had any control of the cotton.

Therefore the fact that the cotton was on the right-of-way resulted in its being burned.

Therefore the railway company is not liable.

Third.

The Court erred in not sustaining the fourth assigned error which is as follows:

The Court erred in refusing the following instructions requested by the defendant.

If the jury believe from the evidence that sparks from a Texas & Pacific Railway engine set the cotton on fire, still that company would not be liable for the destruction of the cotton if the Compress Company failed to use ordinary care to protect said cotton from sparks from the railway engine, and in determining whether the Compress Company was negligent may consider the known combustibility of cotton when baled or loose, and exposed without covering of bagging and its proximity to the railroad, and that it was on the side of an ascending grade on the railroad, where more sparks are thrown than on level ground."

Fourth.

The Court erred in not sustaining the Fifth assigned error which is as follows:

The Court erred in refusing to follow instructions requested by the defendant:

If you believe that a portion of the platform of the Compress Company was on the right-of-way of the Texas & Pacific Railway Company, and you believe that the railway permitted the use by the

Compress Company of that part of the platform on its right-of-way for the purpose of loading and unloading on or from said cars, but the railway had not agreed to the use of that part of the platform by the Compress Company for the purpose of storing cotton and if you find that the cotton where the fire started was on the railway right-of-way then the railway would not be liable."

Fifth.

The Court erred in not sustaining the Sixth Assigned error which is as follows:

The Court erred in refusing the following instruction requested by the defendant:

It appears in the case that plaintiff Rosborough delivered the cotton to the Marshall Compress Company, and the Compress Company placed said cotton on the platform, not covered by any roof and not covered at all except to the extent that you find the bales may have been covered by bagging.

Now if a person or ordinary prudence would not have placed the cotton there, and the cotton being there was a proximate cause which concurring with the negligence of the railway (if the railway was negligent) caused it to be burned, then plaintiff can not recover even though you find the railway was negligent, and no matter how negligent you find the railway to have been.

Sixth.

The Court erred in not sustaining the Seventh Assigned error which is as follows:

The Court erred in refusing the following instructions requested by the defendant:

GENTLEMEN OF THE JURY: You are instructed that the defendant, the Texas & Pacific Railway Company, was not under the duty to so equip its locomotives and operate them as to absolutely prevent the escape of sparks which might send out fire, and although if you should find from the evidence that the fire complained of, was caused by sparks from one of the engines, still, if you further believe from the evidence that whatever locomotive the sparks, if any, came from was equipped with what is known as a spark arresting appliance, and that said company had exercised ordinary care to equip same with one of the best appliances of the kind in general use on railroads in this country, and was in the exercise of ordinary care to keep the same in repair, and that at the time complained of, the locomotive was being operated with ordinary care so as not to cause it to throw any more sparks than would result in the necessary use of said locomotive for the purposes it was being used at the time, then it will be your duty to find for the defendant, the Texas & Pacific Railway Company.

Seventh.

The Court erred in not sustaining the eighth assigned error which is as follows:

The Court erred in refusing the following instructions requested by the defendant:

GENTLEMEN OF THE JURY: You are instructed that if you believe from the evidence that the plaintiff, W. J. Rosborough, caused his cotton to be placed with the Marshall Compress Company at its compress and that at the time of the fire complained of, and prior thereto, said Compress Company had the custody or care of said cotton for said plaintiff, and if you believe from the evidence that said Compress Company had other cotton at its compress and that plaintiff's cotton and said other cotton was on its platform at its compress and that said compress company either caused or permitted any of the plaintiff's cotton or any other cotton, which it had at its compress to be placed out on an open platform so close to the railroad as to render it in danger of catching fire from sparks coming from a passing locomotive; or if you believe it permitted or left loose cotton on or over its platform or left bales of cotton exposed with the top ends uncovered which was likely to catch fire from sparks coming from a passing locomotive, and if you believe that the acts if any, or omissions, if any, on the part of said Compress Company in relation to said cotton, was such a person of ordinary prudence would not have done or left undone in view of the probable danger of fire from passing locomotives, if such danger was probable, and if you further believe that such acts, if any, or omissions, if any, contributed to cause said cotton to catch fire, and that said fire destroyed the cotton involved in this suit, then you will find for the defendant, although you may believe from the evidence that the defendant was also guilty of negligence but for which fire would not have occurred."

The Texas & Pacific Railway Company desires to remove said cause to the United States Supreme Court from the United States Circuit Court of Appeals of the Fifth Circuit, for corrections of said evidence.

Wherefore, it prays that the Texas & Pacific Railway Company be granted a Writ of Error in the above cause to remove the same to the United States Supreme Court to have the proceedings and judgment herein, reviewed, revised and corrected.

It prays that the amount of supercedeas bond be fixed by the Court.

(Signed) F. H. PRENDERGAST,
Att'y for Texas & Pac. Ry. Co.

The above application for a Writ of Error, and assignment of error, has been presented to me, and the same is allowed and granted, and the amount of supercedeas bond fixed at $15,000.00.

(Signed) DON A. PARDEE,
Circuit Judge.

Bond on Writ of Error.

Filed January 22nd, 1914.

In the United States Circuit Court of Appeals for the Fifth Circuit.

WYATT JONES ROSBOROUGH
vs.
TEXAS & PACIFIC RAILWAY CO.

Know all men by these presents, That we, The Texas & Pacific Railway Company, a corporation duly incorporated and organized under and by virtue of an Act of Congress of the United States, as principal, and —— —— and —— —— as sureties, are held and firmly bound unto Wyatt Jones Rosborough, and Intervenors, Home Insurance Company, North British & Mercantile Company, Phoenix Insurance Company of Hartford, Firemans Fund Insurance Company, Aetna Insurance Company, Citizens Insurance Company, of Missouri, Boston Insurance Company, Springfield Fire and Insurance Company, Royal Insurance Company, German American Insurance Company, Continental Insurance Company, Milwaukee Mechanics Insurance Company, Queen Insurance Company, Insurance Company of North America, Hamburg Bremen Insurance Company, and Phoenix Insurance Company of Brooklyn, Fidelity Fire Insurance Company, in the sum of Fifteen Thousand Dollars, to be paid to the said Wyatt Jones Rosborough, and the insurance companies named above, their executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents, sealed with our seals, using scrolls for seals, and signed with our names, this the —— day of December, 1913.

The condition of the foregoing bond is such that, whereas, lately at a term of the United States Circuit Court of Appeals for the Fifth Circuit at New Orleans, in a suit pending in said court, between Wyatt Jones Rosborough and the Insurance Companies named above, as plaintiff and intervenors, and the Texas & Pacific Railway Company as defendant, No. 2520 on the Docket of said Court, a judgment was rendered on the 9th day of December, 1913, affirming a judgment rendered in said cause on the 15th day of October, 1912, in the District Court of the United States for the Eastern District of Texas, and corrected on the 27th day of Febr'y 1913, for the sum of Thirty-four thousand two hundred and ninety-seven dollars and six cents, and costs of suit, with six per cent thereon from the date of said judgment.

And whereas, the said Texas & Pacific Railway Company has obtained a writ of error and has filed a copy thereof in the office of the Clerk of the United States Circuit Court of Appeals, for the Fifth Circuit to reverse said judgment, and has also obtained a citation directed to the said Wyatt Jones Rosborough and the Insurance Companies named above, and their attorney of Record, S. P.

Jones, citing and admonishing them to appear in the Supreme Court of the United States, at the City of Washington in the District of Columbia, within thirty days from the date thereof.

Now if the said Texas & Pacific Railway Company shall prosecute its writ of error to effect, and answer all damages and costs, if it fail to make good its plea, then the above obligations to be void, otherwise to remain in full force and virtue.

(Signed) THE TEXAS & PACIFIC RAILWAY COMPANY,
(Signed) By F. H. PRENDERGAST,
Agent & Att'y.
(Signed) R. H. STEWART.
(Signed) C. R. LUNDY.

Approved & accepted.
(Signed) DON A. PARDEE,
Circuit Judge.

Clerk's Certificate.

UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Circuit.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 141 to 157 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 2520, wherein the Texas & Pacific Railway Company is plaintiff in error, and W. J. Rosborough and others are defendants in error, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 140 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 24th day of January, A. D. 1914.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals.

UNITED STATES OF AMERICA,
Fifth Judicial Circuit:

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Fifth Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgement of a plea which is in your Court, before you, or

some of you, between the Texas and Pacific Railway Company, plaintiff in error, and Wyatt Jones Rosborough and the Home Insurance Company, North British & Mercantile Company, Phoenix Insurance Company of Hartford, Firemans Fund Insurance Company, Aetna Insurance Company, Citizens Insurance Company, of Missouri, Boston Insurance Company, Springfield Fire and — Insurance Company, Royal Insurance Company, German American Insurance Company, Continental Insurance Company, Milwaukee Mechanics Insurance Company, Queen Insurance Company, Insurance Company of North America, Hamburg Bremen Insurance Company and Phenix Insurance Company of Brooklyn, Fidelity Fire Insurance Company, defendants in error, a manifest error hath happened to the great damage of the Texas & Pacific Railway Company, plaintiff in error, as by its complaint appears, said judgement rendered on the 9th day of December, 1913.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgement be therein given that then under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, held in the City of Washington, in the District of Columbia, together with this writ, so that you have the same at said City of Washington in not exceeding thirty days from the 22nd day of January, 1914, the date of the issuance of the citation herein, in the said Supreme Court of the United States to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court of the United States may cause further to be done therein to correct their error, what of right and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, this the 22nd day of January, in the year of our Lord, One Thousand Nine Hundred and Fourteen.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals.
Clerk of the United States Circuit Court
of Appeals for the Fifth Circuit.

Allowed:
DON A. PARDEE,
U. S. Circuit Judge.

I hereby certify that a true copy of the above writ has this day been lodged in this the Clerk's office for the use of the Defendant in error.

FRANK H. MORTIMER,
Clerk of the United States Circuit Court
of Appeals for the Fifth Circuit.

[Endorsed:] No. 2520. United States Circuit Court of Appeals for the Fifth Circuit. Texas & Pacific Railway Com-

pany, Plaintiffs in Error, vs. W. J. Rosborough, et al., Defendants in Error. Writ of Error. U. S. Circuit Court of Appeals. Filed Jan. 22, 1913. Frank H. Mortimer, Clerk.

UNITED STATES OF AMERICA,
Fifth Judicial Circuit:

The President of the United States to Wyatt Jones Rosborough, Home Insurance Company, North British & Mercantile Company, Phoenix Insurance Company of Hartford, Firemans Fund Insurance Company, Aetna Insurance Company, Citizens Insurance Company of Missouri, Boston Insurance Company, Springfield Fire and Insurance Company, Royal Insurance Company, German American Insurance Company, Continental Insurance Company, Milwaukee Mechanics Insurance Company, Queen Insurance Company, Insurance Company of North America, Hamburg Bremen Insurance Company and Phenix Insurance Company of Brooklyn, Fidelity Fire Insurance Company:

You are hereby cited and admonished, to be and appear before the United States Supreme Court to be held in the City of Washington, in the District of Columbia, within thirty days from the date of this writ, pursuant to a writ of error filed in the Clerk's office of the United States Circuit Court of Appeals for the Fifth Circuit, wherein the Texas & Pacific Railway Company is plaintiff in error, and Wyatt Jones Rosborough and the Insurance Companies named above, are defendants in error, to show cause if any there be, why the judgement rendered against said Texas & Pacific Railway Company as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the United States, this the 22nd day of December, 1913, and of the Independence of the United States the one hundred and 138th year.

DON A. PARDEE,
United States Circuit Judge.

I accept service of the above citation in error on this 23rd day of January, 1914.

S. P. JONES,
Attorney for Defendants in Error.

[Endorsed:] No. 2520. In the United States Circuit Court of Appeals, Fifth Circuit. Texas & Pacific Railway Company, Plaintiff in Error, vs. W. J. Rosborough et al., Defendants in Error. Citation, and acceptance of service. U. S. Circuit Court of Appeals. Filed Jan. 24, 1914. Frank H. Mortimer, Clerk.

Endorsed on cover: File No. 24,050. U. S. Circuit Court Appeals, 5th Circuit. Term No. 899. Texas & Pacific Railway Company, plaintiff in error, vs. Wyatt Jones Rosborough, Home Insurance Company, North British & Mercantile Company et al. Filed February 10th, 1914. File No. 24,050.

Supreme Court, U. S.
FILED
MAR 13 1914
JAMES D. MAHER
CLERK

IN THE

Supreme Court of United States

OCTOBER TERM, 1913.

TEXAS & PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

W. J. ROSBOROUGH AND INTERVENORS INSURANCE COMPANIES,
Defendants in Error.

No. 357

MOTION TO AFFIRM OR DISMISS, AND BRIEF AND ARGUMENT OF DEFENDANTS IN ERROR ON SAID MOTION.

S. P. JONES,
Marshall, Texas.
WM. THOMPSON,
J. S. PATTERSON,
Dallas, Texas.
Attorneys for Defendants in Error.

IN THE

Supreme Court of United States

OCTOBER TERM, 1913.

TEXAS & PACIFIC RAILWAY COMPANY,
Plaintiff in Error,
vs.
W. J. ROSBOROUGH AND INTERVENORS INSURANCE COMPANIES,
Defendants in Error.

No. 809

MOTION TO AFFIRM OR DISMISS, AND BRIEF AND ARGUMENT OF DEFENDANTS IN ERROR ON SAID MOTION.

MOTION TO AFFIRM OR DISMISS, FILED BY DEFENDANTS IN ERROR.

Now come W. J. Rosborough, Fireman's Fund Insurance Company, and the other defendants in error by their attorneys, appearing in that behalf, and move the court to affirm or dismiss the above entitled cause under subdivisions five and six of Rule 6 of the Supreme Court of the United States, because it is manifest that the writ of error in this cause was sued out for delay only, and that the questions on which the

decision of said cause depend are so frivolous as to not need further argument.

Statement of Nature and Result of the Cause.

W. J. Rosborough and intervenors, defendants in error, recovered judgment against the Texas & Pacific Railway Company in the District Court of the United States for the Eastern District of Texas at Jefferson, Texas, for $34,297.06, being the value of cotton that was destroyed by fire that escaped from the locomotives and engines of the Railway Company by reason of its negligence.

The cause was affirmed by the United States Circuit Court of Appeals for the 5th Circuit, 209 Federal Advance Sheets, page 205.

In March, 1910, W. J. Rosborough was the owner of many bales of cotton located at the compress of the Marshall Compress Company, in Marshall, Harrison County, Texas, alongside the main line of the Texas & Pacific Railway. The intervenors Insurance Companies carried insurance in various amounts partially covering the said property.

About the 8th day of March, 1910, the cotton was set on fire by sparks escaping from the locomotives and engines of the Texas & Pacific Railway Company, and same was damaged and destroyed to the total amount of $29,664.50, of which damage a portion was paid by the intervenors Insurance Companies, and they thereby became interested in said cause of action.

The evidence was sufficient to show; in fact, the preponderance of the evidence showed that the engines passing alongside the cotton just before the fire broke out were throwing cinders too large to have escaped from a locomotive equipped with reasonably safe spark arresting appliances, some of said cinders being as large as the end of an ordinary man's thumb, or about 15/16 of an inch in diameter.

The trial court fairly and fully presented the case to the jury in a lengthy charge, limiting the right of defendants in error to recover by placing upon them the burden of showing that the fire was set by the negligence of the Railway Company and carefully defining the doctrine of contributory negligence.

The jury found in favor of defendants in error. There was no issue as to the value of the property destroyed.

The plaintiff in error complained in the United States Circuit Court of Appeals that the trial court erred in admitting the evidence of C. L. Edwards to the effect that a few days after the property was destroyed other engines of the Railway Company passing the same place under similar conditions emitted large quantities of fire and cinders, and that such cinders were larger than could have passed through the spark arresting appliances of an engine in reasonably safe condition.

The United States Circuit Court of Appeals held

that this evidence was admissible under the fifth and seventh paragraphs of the first amended answer of the Railway Company and that if its admission after the defendants in error had rested or in rebuttal was error, that it was within the discretion of the trial court.

There being no other assignments of error seriously insisted upon and none of the assignments of error being well taken, the judgment of the trial court was affirmed by the United States Circuit Court of Appeals, which would have finally disposed of this cause but for the fact that the Texas & Pacific Railway Company enjoys the privilege of operating its road under a charter granted by an act of the United States Congress; a circumstance that has nothing to do with the merits of the controversy.

The defendants in error by their attorneys aforesaid present with this motion to affirm or dismiss a printed brief and argument in support thereof, which is hereto annexed.

Wherefore the defendants in error pray that the said cause be affirmed or dismissed. Or that if the motion to affirm or dismiss is not granted, that the cause be transferred for hearing to the summary docket and disposed of.

S. P. Jones,
Marshall, Texas.
Wm. Thompson,
J. S. Patterson,
Dallas, Texas.
Attorneys for Defendants in Error.

IN THE
Supreme Court of United States

OCTOBER TERM, 1913.

TEXAS & PACIFIC RAILWAY COMPANY,
Plaintiff in Error,
vs.
W. J. ROSBOROUGH AND INTERVENORS INSURANCE COMPANIES,
Defendants in Error.
No. 800

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF AND ARGUMENT OF DEFENDANTS IN ERROR ON MOTION TO AFFIRM OR DISMISS.

STATEMENT OF THE NATURE AND RESULT OF THE CAUSE OF ACTION IN THE TRIAL AND CIRCUIT COURT OF APPEALS

The defendant in error, W. J. Rosborough, was the owner of four hundred and ten bales of cotton located at the Marshall Compress on the line of the Texas & Pacific Railway, in Marshall, Texas, and on

the 8th day of March, 1910, large portions of this property were destroyed by fire, the total amount of the damage being $29,664.50.

A few minutes after three of the engines of the Railway Company passed alongside the compress, fire suddenly broke out in the cotton, resulting in damage thereto. It was noticed by persons at the compress at the time that the engines were throwing very large quantities of cinders of very large size, some of them being about 15/16 of an inch in diameter.

The intervenors Insurance Companies paid to Kosborough a certain portion of the damage, and were subrogated to an interest in the claim against the Railway Company. Suit was brought in the District Court of Harrison County, Texas, for the value of the cotton destroyed, and was properly removed to the District Court of the United States for the Eastern District of Texas.

In the suit the defendant in error, Rosborough, and the intervenors Insurance Companies, alleged in substance that the property was destroyed by reason of the negligence of the Railway Company, and that it was liable to them for the value thereof. They also alleged that the Texas & Pacific Railway Company would endeavor to defeat liability on account of the contributory negligence of the Compress Company, and the Compress Company was made a party to the suit, and it was asked that if it should appear that the Compress Company was guilty of negligence that

relieved the Railway Company from liability by reason of it being the agent of the defendants in error, that the defendants in error have judgment against the Compress Company for the value of the cotton destroyed.

The plaintiff in error answered, denying that the property was destroyed by sparks escaping from any of its engines, and denying that it had been guilty of any negligence in the event it should be found that the property was destroyed by sparks that escaped from is engines.

The defendants in error made out a *prima facie* case against the Railway Company by testimony that showed and strongly tended to show that the cotton was destroyed by fire that was thrown from one of the locomotives or engines operated by the Railway Company and in addition that the cinders thrown by some of the engines that passed the cotton a short time before the fire broke out were so large that they could not have passed through a spark arrester that was in proper condition, or repair, some of them being as large as the end of an ordinary man's thumb, or 15/16 of an inch in diameter. The defendants in error introduced witness J. M. Pruitt, a cotton classer at the time, who testified (Tr. 44):

"One thing that attracted my attention to this train was the fact that a switch engine was pushing behind it, another thing was the throwing of cinders down on me as the train passed. The cinders came

down on me in sufficient quantities to make them a bit uncomfortable from the fact it felt like they might go down my collar. I jerked up my shoulders and tucked my head down to protect myself. Afterwards another train passed. It was a freight train. I was at about the same spot as when the passenger train passed, and I was there because when the first train passed I realized it was dangerous and fire might break out. I spoke to the superintendent about it. When the second train passed the cinders fell all over me and round on the platform. The cinders were of various sizes. I suppose they would run from very small—something like a pin-head—up to the size of the end of my thumb or something like that. I mean the size from the first joint of my thumb to the end. That is the only way I know to describe their size. (This witness testified, page 53, that his thumb was 15/16 of an inch in diameter.) As the switch engine got about opposite to where I was standing, it began to whistle and someone holloaed, 'fire,' and I looked down and saw the smoke and I ran down to where the smoke was. I believe it was the superintendent of the compress who holloaed 'fire.' The fire was on the west end of the platform, I believe, although I am not sure of the points of the compass there."

The Railway Company endeavored to meet this *prima facie* case by introducing evidence that tended to show that it had equipped its engines with proper spark arresting appliances, had exercised ordinary care to keep them in reasonably safe condition, and that it had exercised ordinary care in the manner of the operation of its engines as regards the escape of fire therefrom.

The testimony offered by the Railway Company was to the effect that the spaces between the wires of the netting used as a spark arrester in the locomotives operated by it was a little less than one-fourth of an inch in diameter or approximately 3/16 of an inch, and that all of its engines were properly equipped.

In rebuttal the defendants in error proved by the witness Chas. L. Edwards (Tr. 103), that three days after the fire while he was making an investigation on behalf of the insurance companies that he gathered up some cinders that he had seen fall from engines operated by the Railway Company, and among them a cinder which he saw fall on a bale of cotton and which became imbedded in the cotton, scorching the same, and that one of these cinders measured in the presence of the jury was 3/8 of an inch; another 3/4 of an inch in diameter, and another 7/16 of an inch in diameter.

The Texas & Pacific Railway Company objected to this proof being made by the witness C. L. Edwards.

I.

The admission of the evidence of C. L. Edwards was made the main question by the Texas & Pacific Railway Company in its effort to secure a reversal of the cause in the United States Circuit Court of Appeals.

The United States Circuit Court of Appeals

held that the testimony was admissible and in support of the correctness of that position we submit the following list of authorities:

Railway Co. vs. Richardson, 91 U. S. 454;
Railway Co. vs. Watson, 190 U. S. 289;
Railway Co. vs. Putnam, 118 U. S. 545;
Railway Co. vs. Donaldson, 73 Tex. 124;
Texas & N. O. Ry. vs. Commercial Union Assurance Co., 137 S. W. R. 402;
Tuttle vs. Railway Co., 119 Pac. R. 371;
Railway Co. vs. Home Ins. Co., 142 S. W. R. 309;
Railway Co. vs. Cecil, 90 S. W. R. 985;
Railway Co. vs. Neal, 139 S. W. R. 1060;
Megill Bros. vs. Railway Co., 69 S. E. 156, (S. C.);
Toffe vs. Railway Co., 117 Pac. Rep. 989 (Ore.);
Asplund vs. Railway Co., 115 Pac. Rep. 1043 (Wash.);
Railway Co. vs. Milling Co., 126 S. W. R. 118 (Ky.);
T. & P. Ry. Co. vs. Woolridge, 126 S. W. R. 603;
Railway Co. vs. Shannon, 108 Pac. Rep. 401 (Okla.);
Thompson on Negligence, sec. 2374;
Railway Co. vs. Lewis, 2 U. S. C. C. A. 453;
Railway Co. vs. Gilbert, 3 U. S. C. C. A. 264;
St. Louis & S. F. Ry. vs. Mathews, 165 U. S. Rep. 1.

The evidence that other engines which were equipped with the same spark arrester as the one that set the fire permitted the escape of cinders so large

that they could not have escaped from an engine equipped with a proper spark arrester in good repair is admissible as showing and tending to show that the engines of the Railway Company were not equipped with proper spark arresters and that proper care was not exercised to keep its spark arresters in repair.

Remembering that the plaintiff in error offered testimony showing that all of its engines were equipped with the same spark arresters, and were inspected under the same management, it occurs to me that the opinion in the case of *T. & P. Ry. Co. vs. Watson*, 190 U. S. 286, is absolutely conclusive that the evidence of C. L. Edwards to the effect that other engines a short time after the fire at the same place and under similar conditions threw large cinders which could not have passed through a proper spark arrester was admissible. I cannot see how it can be considered an open question, for the same point was directly made in that case.

In the Watson case (in the statement of the case made by Mr. Justice White), it is said:

"It was shown by the evidence that at the point where the fire in question occurred the track of the Railway Company ran east and west, and the train which it was asserted caused the fire in question was moving eastward, and a strong wind was blowing from the north. A verdict was rendered in favor of the plaintiff Watson and against the plaintiff Insurance Company in favor of the Railroad."

Thus it was clearly shown that if an engine of the Railway Company set out the fire that the same was positively identified, and that there was no question of other engines having set the fire.

Chief Justice White, in disposing of this question, says:

"First. In several assignments it is claimed that the circuit court of appeals erred in holding that the trial court properly admitted the evidence of witnesses to the effect that at or about the time of the fire complained of, and about the time of the passing of the locomotives which it was charged occasioned the fire, the witnesses observed other fires at various points not far removed from the place where the cotton was burned and south of and near to the railway track. In the light of the decision of this court in *Grand Trunk R. Co. vs. Richardson*, 91 U. S. 454, 470, 23 L. Ed. 356, 362, we think this evidence was competent as having a tendency to establish that the destruction of the property of the plaintiff was caused by the locomotive in question, and as tending to show negligence in its construction or operation."

The opinion in this case seems to be conclusive and leaves no doubt that the trial judge properly admitted the evidence of the witness C. L. Edwards.

The case of *Grand Trunk Railway vs. Richardson*, 91 U. S. 454, is an important authority upon two points raised by the assignments of error of plaintiff in error, viz.:

That the evidence of C. L. Edwards to the effect that some days after the property was destroyed en-

gines passing the place of the fire threw larger cinders than could have passed through a proper spark arresting appliance was not admissible as tending to show negligence, and if admissible was not admissible as rebuttal evidence. The Richardson case effectively answers both these propositions. On page 456 it is said:

"The evidence tended to show that the fire was communicated from one of two locomotive engines belonging to the plaintiff in error, the first drawing a passenger train westerly, passing about half past one o'clock in the afternoon the mill of the defendants in error; and the other, drawing a freight train easterly, passing it about four o'clock the same afternoon."

On page 458 it is said:

"After the plaintiff in error had rested its case, the defendants in error, subject to its exception, were allowed to prove that at various times during the same summer, before this fire occurred, some of the company's locomotives scattered fire when passing the mill and bridge, without showing either that those which it was claimed communicated the fire in question were among the number, or that they were similar in their make, state of repair, or management, to said locomotives."

It will be observed that the direct issue is clearly made. On page 470 it is said:

"The third assignment of error is that the plaintiffs were allowed to prove, notwithstanding objection by the defendant, that, at various times during the

same summer before the fire occurred, some of the defendant's locomotives scattered fire when going past the mill and bridge, without showing that either of those which the plaintiffs claimed communicated the fire was among the number, and without showing that the locomotives were similar in their make, their state of repair, or management, to those claimed to have caused the fire complained of. The evidence was admitted after the defendant's case had closed. But, whether it was strictly rebutting or not, if it tended to prove the plaintiff's case its admission as rebutting was within the discretion of the court below, and not reviewable here. The question therefore, is, whether it tended in any degree to show that the burning of the bridge, and the consequent destruction of the plaintiff's property, were caused by any of the defendant's locomotives. The question has often been considered by the courts in this country and in England; and such evidence has, we think, been generally held admissible, as tending to prove the possibility, and a consequent probability, that some locomotive caused the fire, and as tending to show a negligent habit of the officers and agents of the railroad company. (Citing a number of authorities.) These are, it is true, some cases that seem to assert the opposite rule. It is, of course, indirect evidence, if it be evidence at all. In this case it was proved that engines run by the defendant had crossed the bridge not long before it took fire. The particular engines were not identified; but their crossing raised at least some probability, in the absence of proof of any other known cause, that they caused the fire; and it seems to us, that, under the circumstances, this probability was strengthened by the fact that some engines of the same defendant, at other times during the same season, had scattered fire during their passage. We cannot, therefore, sustain this assignment."

In the Richardson case it was contended by the Railway Company in its argument that inasmuch as the defendant in error failed to show that the engines were similarly equipped it was error to admit evidence of other fires by other engines; in the case at bar the testimony offered by the Railway Company showed that all of its engines were equipped with the same spark arrester.

The doctrine announced that previous scattering of fire by the Railway Company's locomotives, is admissible in suits for damages without identifying engine, to show probable cause and negligence of company, is supported by a great number of authorities that have cited the Richardson case with approval and reference is here made to a list of those authorities given in vol. 8, Notes on United States Supreme Court Reports, page 702.

In the case of *Vicksburg & Meridan R. R. vs. Putnam*, 118 U. S. 553, the trial court admitted evidence to the effect that the railroad was in an unsafe condition at and near the place where the wreck occurred, and Mr. Justice Gray in disposing of the exceptions to the admission of such evidence, says:

"There being evidence tending to show that the accident was caused by a worn-out rail, it was, to say the least, within the discretion of the court to admit evidence that the general condition of that portion of the road which included the place where the accident occurred had long been bad, and that the rails had been in use for a great many years. Such evidence had

some tendency to prove both that a worn-out rail was the cause of the accident and that the defendant had neglected to repair the defect."

In he case of *T. & P. Ry. Co. vs. Woolridge*, 126 S. W. 603, the court says:

"There was no error in permitting testimony that other engines belonging to appellant had thrown fire along and near appellant's right-of-way at other times since such proof tended to rebut appellant's evidence to the effect that all of its engines were provided with the same spark arrester, which is described as being the latest and most up-to-date in use in the country."

In *Missouri Pacific Ry. Co. vs. Donaldson*, 73 Texas 124, 11 S. W. R. 164, evidence was offered to show that a fire had originated near the same time as the one under investigation from one of the railway company's engines at a different place and from a different engine from the one causing the damage for which the suit was brought. In the opinion by Judge Stayton, it is said:

"Other parts of the witness' testimony tend to show that the fire at Dickinson originated from sparks escaping from one of defendant's engines, though not from the one from which it is claimed the fire in question originated; and there was much evidence tending to show that all the appliances usual to prevent the escape of fire were used on the engines of defendant. So much of the evidence objected to we are of the opinion was admissible, as it had a tendency to rebut this evidence offered by defendant, and

to show that the officers and agents of the company in this respect were not so careful as they claimed to have been."

In further support of the admissibility of this evidence as showing and tending to show that the engines of the Railway Company were not equipped with proper spark arresting appliances, attention is directed to the language of the Court of Civil Appeals of the State of Texas in the case of *T. & N. O. Ry. Co. vs. Commercial Union Assurance Company*, 137 S. W. R. 401, where it is said on rehearing, page 402:

"In its motion for rehearing, appellant complains of our failure to sustain the seventh, eighth and ninth assignments of error. These assignments complain of the court's action in admitting evidence of the setting out of numerous fires by defendant during the summer and fall of 1909, between Kaufman and Crandall; the defendant having admitted that the engine which set out the fire complained of was engine 608. It is contended the evidence should have been confined to the condition of said engine. Notwithstanding appellant's admission that engine 608 set out the fire which caused the damage, it introduced testimony that all its engines were equipped with the best approved spark arresters, and it was because of the admission of this evidence by defendant the plaintiff was permitted to introduce in rebuttal evidence that its engines were not so equipped, and that defendant's engines, generally, during the months of July, August and September, threw out sparks and set out fires. This evidence was properly admitted in rebuttal of defendant's evidence that all its engines were properly equipped as to spark arresters."

In the case of *Texas & Pacific Railway vs. Rutherford*, in which writ of error was refused by the Supreme Court, the Court of Civil Appeals of Texas held that it was not error to admit proof of other fires at different times and places, and this was in a case where the proof showed the particular engine, if any engine set out the fire which destroyed the property involved in the suit.

The defendants in error made a *prima facie* case of negligence against the Railway Company by introducing evidence that showed and tended to show that the cotton was burned by fire escaping from engines of the Railway Company. They also emphasized the *prima facie* case by showing that the cinders which probably set the cotton on fire were very large in size, as large as a man's thumb, or almost an inch in diameter. The Railway Company could meet that case by showing that the locomotives were equipped with proper spark arresters, that the locomotives were properly handled as regards the escape of fire therefrom, and that the Railway Company had exercised ordinary care to keep the locomotives in a reasonably safe condition as regards the escape of fire therefrom.

The Railway Company introduced testimony which, if true, answered the *prima facie* case made by the proof offered by the defendants in error, especially as to the character and condition of its spark arresters. The testimony on this subject would have justified a verdict in favor of either the plaintiff in

error or the defendants in error. The defendants in error saw fit to answer the explanatory evidence of the plaintiff in error by introducing testimony which, if true, showed that the plaintiff in error had not exercised ordinary care to keep its engines in a reasonably safe condition in that it was operating other engines at and about the same time that were permitting the escape of large cinders that could not have escaped from an engine with a proper spark arrester. This was shown by the testimony of C. L. Edwards.

It is contended by the plaintiff in error that the testimony of the witness C. L. Edwards was not admissible because the plaintiff in error had shown that if the fire was set out by one of its engines that it was one of three engines and that it was therefore not permissible for the defendants in error to prove that other engines at other times had permitted the escape of large cinders, etc.

The position taken by plaintiff in error with reference to the admission of the testimony of C. L. Edwards is answered in three ways:

First. The particular engine that set out the fire was not identified or pointed out by the Railway Company, but it contended that none of its engines set out the fire.

Second. The evidence of Edwards was not testimony of other fires from which it was sought to prove defective condition of the engines of the Railway

Company by inference, but was evidence showing that the engines that threw the particular cinders could not have been equipped with spark arresters in proper condition such as plaintiff in error contended all of its engines had.

Third. That inasmuch as the proof offered by the defendants in error showed that the particular engine that set out the fire was throwing cinders that could not have escaped from an engine with a proper spark arrester in proper condition, and the Railroad Company was contending that it had exercised ordinary care to keep its spark arresters in good condition, the testimony which showed that it was, at and about the same time operating other engines that were not equipped wih good spark arresters in proper repair (which is proven by the sizes of the cinders Edwards saw fall from them) was cogent to convince the jury that the Railway Company had not exercised ordinary care in keeping the spark arrester in the engine that did set out the fire in proper condition.

The third proposition, which to my mind, is a full and complete answer to the contention of the plaintiff in error can be more readily, correctly, and more fully understood by a realization that the jury might have found that the Railway Company had exercised ordinary care in the operation of its engines, had equipped them with proper spark arresting appliances, and might have found that the spark arresting appliances in the engine that set out the fire were

in a defective condition, but would not have been willing to find that such defective condition alone was sufficient to charge the railway company with negligence, or a failure to exercise ordinary care to keep the spark arrester in good condition; but with the testimony of other witnesses which shows and tends to show that it was operating other engines at and about the same time which also had defective spark arresting appliances was sufficient to justify the jury in reaching the conclusion that the Railway Company was guilty of negligence in permitting the engine that did set the fire to be operated with a defective spark arresting appliance.

When the testimony of the witness C. L. Edwards is considered and measured by the question of whether the evidence proved or tended to prove an issue involved in the trial of the case, it will be readily seen that his testimony showed and tended to show that the conduct of the Railway Company in sending out an engine that had a defective spark arrester amounted to actionable negligence in that it enabled the jury to see that the Railway Company was not at the time exercising ordinary care in the inspection and repair of the spark arresting appliances in its engines.

In considering the liability of plaintiff in error upon the theory of the case that the negligence consisted of a failure upon the part of the Railway Company to exercise ordinary care in the inspection and

repair of its spark arresting appliances in its engines, the jury might have concluded, without the evidence of C. L. Edwards, that the facts and circumstances were sufficient to justify a verdict that the Railway Company had failed to exercise ordinary care, but it is not only the privilege of the plaintiff in the trial court but his duty to furnish all of the relevant testimony that can be produced, which shows or tends to show that he is entitled to the relief sued for, and where the defendant in the trial court has attempted to answer the case made by the plaintiff it is the duty of the plaintiff to produce all the testimony that rebuts or breaks down the defense presented. Therefore, keeping in mind the fact that the inquiry in this case was not necessarily restricted to whether the Railway Company had equipped its engines with proper spark arresters, had exercised ordinary care to operate them safely, and had kept the spark arresting appliances in good condition; but that it was as to whether it had exercised ordinary care to keep the spark arresting appliances in good condition, and fully realizing that it was an important question to be determined as to whether the Railway Company had exercised ordinary care to keep the spark arresting appliances in good condition, and that if it had exercised ordinary care to do so, that the same constituted as full and complete and answer to the demands of the defendants in error as if it had successfully kept the spark arresting appliances in good condition we realize the importance

of the testimony of the witness by whom it was proven and shown that the company was in the habit of operating engines at and about the same time over the same portion of its road, which were not equipped with proper spark arresting appliances, as authorizing the jury to reach the conclusion that the Railway Company was guilty of negligence in that it had failed to exercise ordinary care to keep the spark arresting appliances on its various engines in a reasonably safe condition as regards the escape of fire therefrom.

Negligence is a relative term—a failure to exercise that degree of care that an ordinarily prudent person would exercise under the exigencies of the particular situation. An act of omission or commission that should not have occurred; in other words, that an ordinarily prudent person would not have permitted to have occurred.

A jury may reach the conclusion that the act under investigation amounts to negligence or a failure to exercise ordinary care by the proof of the particular act as viewed by them from the various angles. On the other hand, a jury might reach the conclusion that a single act of omission or commission was not sufficient to justify a finding of negligence. Therefore when a particular act is to be passed upon by a jury in that the jury is to determine whether the same amounted to a failure to exercise ordinary care, much light will be thrown upon the subject by proof that the particular conduct or acts under investigation were

not the result of accident or chance, but that the same were habitual, just as a man might erect a building with one defective support without showing a lack of ordinary prudence, but if he erected a building with only one sound support, it would be conclusive that it was not the result of chance or accident but was the effect of gross negligence and carelessness. Therefore, the jury might conclude that in the exercise of ordinary care the Railway Company had failed to discover and repair a defect in the particular engine that set fire to the property of the defendants in error, but when it is shown that a great number of its engines were equipped with defective spark arresting appliances, it is conclusive that this condition was not occasioned by any accident or inadvertance, but was the result of inexcusable carelessness justifying the jury in reaching the conclusion that the Railway Company was guilty of negligence in permitting the engine that set the fire to be operated with a defective spark arresting appliance.

The evidence of C. L. Edwards was admissible as direct evidence and also in rebuttal for the following reasons:

Under the rules of law, applicable in the State of Texas and in the United States courts and in most of the state courts, where the matter has not been controlled by statute, the *prima facie* case that it made by the plaintiff in fire cases by showing the destructions of plaintiff's property by sparks which escaped from

the Railway Company's locomotives, may be answered by the Railway Company showing that it had equipped its engines with proper spark arresters; that ordinary care was exercised by the Railway Company to keep such spark arrester in a reasonably safe condition, and that it had exercised ordinary care in the operation of its engines as regards the escape of fire therefrom.

Now, keeping in mind that the case made by defendants in error, though they may have proven positively that one of the Railway's engines set out the fire, may be answered by showing that the engine was originally properly equipped, that ordinary care was exercised in handling it, and that ordinary care was exercised in keeping the engine in a reasonably safe condition as regards the escape of fire therefrom, it is clear that whenever the railway company seeks to excuse its liability by showing that ordinary care was exercised to keep the engine in a reasonably safe condition as regards the escape of fire therefrom, that any evidence which shows or tends to show that the Railway Company failed in any of these particulars, is not only admissible but cogent to meet the answer made by the proof offered by the Railway Company.

The fact that the inspectors at Marshall and at Longview who inspected engines which the Railway Company says set out the fire, if it was set out by an engine of the Railway Company, also probably inspected the engines that threw the sparks that could not have been thrown by an engine in safe condition

are circumstances to enable the jury to determine whether the Railroad Company exercised ordinary care in keeping the spark arresting appliances of the engines in reasonably safe condition as regards the escape of fire therefrom.

The position of the Railway Company is in effect that it can completely answer the plaintiff's case by showing that if any engine set the fire it was one of three, and then introducing its own inspectors to show that ordinary care had been exercised in inspecting and keeping the spark arresting appliances in reasonably safe condition, and that the defendants in error are not permitted to attack the inspector by anything except direct testimony.

The defendants in error contend that they have the right to attack the testimony offered by the Railway Company tending to show a compliance with the requirements of the law, and that they are not restricted in such attack to direct evidence but what they may show by circumstances that the Railway Company was negligent in that the persons having the duty to inspect and keep the engines in reasonably safe condition as regards the escape of fire therefrom, have failed to discharge that duty in that they were in the habit of permitting other engines to go out on the road, not safely equipped but having defective spark arresters that permitted the escape of large quantities and very large cinders that could not possibly have escaped from an engine in proper condition; and bearing in mind that

it becomes a question of fact as to whether the permitting of the engine that set the fire to be in a condition to throw the large cinders actually constituted negligence; in other words, assuming that the testimony of J. M. Pruitt, to the effect that the engine that set the fire was throwing cinders as large as the end of his thumb, practically 15/16 of an inch in diameter, that does not *per se* constitute negligence; when the Railway Company attempts to answer it by showing that the Company has exercised ordinary care to inspect the engine and keep it in a reasonably safe condition as regards the escape of fire therefrom; also realizing that the statement of the inspectors and repairers that they have discharged their duty is not conclusive and binding upon the jury but may be disregarded when the facts and circumstances are such as to justify the jury in reaching the conclusion that the witnesses have not probably spoken the truth, it becomes an important question as to whether other engines that were operated over the same portion of the road and along the track by the compress where the cotton was stored, were in a reasonably safe condition as regards the escape of fire therefrom; and if they were not, in other words, if the Railway Company was in the habit of sending engines over its road, alongside the cotton platform, which were defective as regards the escape of fire therefrom, it would enable the jury to ascertain that the failure to have the particular engine which set fire to the cotton in a rea-

sonably safe condition as regards the escape of fire therefrom, constituted actionable negligence on the part of the Railway Company. So the testimony is admissible as tending to establish two theories:

First. That the engines of the Railway Company which were operated over the track alongside the compress platform were defective as regards the escape of fire therefrom.

Second. That the Railroad Company did not exercise ordinary care to keep the engines in a reasonably safe condition as regards the escape of fire therefrom for the reason that it permitted a great number of engines or other engines than the one that set the fire to be operated along that part of the track which were defective.

Keeping in mind the fact that the engines that permitted the escape of cinders exhibited by Major Edwards and testified to by him as having come from engines that passed the platform two or three days after the fire, could not have been equipped with a spark arrester such as it was necessary for them to have been equipped with, in that the cinders were so large that they would not have passed through a good spark arrester, and that the cinders that were thrown by the engines that the Railway Company says set out the fire, if any set out the fire, and which cinders were described by Pruitt and McElroy, could not have escaped from an engine equipped with a good spark arrester; if the jury reached the conclusion

that these cinders set fire to the cotton and that the cinders were as large as described by Pruitt and McElroy, the jury would be convinced that the spark arrester of the engine sending out those cinders was defective. This, however, could be answered by the jury saying that it is true, the spark arrester was defective, but the Railroad Company has exercised ordinary care to keep it in a reasonably safe condition as regards the escape of fire therefrom, and therefore plaintiff is not entitled to recover notwithstanding that the engine was in a defective condition. But when the plaintiff answered this supposed case by introducing the testimony of Major Edwards which shows that other engines were operated by the defendant alongside the cotton at and about the same time, which were also defective, it not only justifies the jury in reaching the conclusion that the Railway Company was negligent in that it had not exercised ordinary care to keep the particular engine that set the fire in a reasonably safe condition as regards the escape of fire therefrom, but the testimony is so conclusive that the Railway Company was negligent in this regard that the jury would not have been warranted in reaching the conclusion that it had exercised ordinary care to keep its engines in a reasonably safe condition as regards the escape of fire therefrom.

When we realize that the law permits the jury to reach the conclusion that the Railway Company has failed to exercise ordinary care with regard to keep-

ing its spark arresters in a reasonably safe condition from testimony that shows that the sparks that escaped were too large to have escaped from an engine in a reasonably safe condition, notwithstanding the direct testimony of the employes of the Railway Company that the engine was in perfect condition, we can have little or no difficulty in reaching the conclusion that the Company failed to exercise ordinary care to keep its engines in reasonably safe condition as regards the escape of fire therefrom, when the testimony shows that a number of its engines that were operated along the road at approximately the same time and place threw sparks and cinders that could not have escaped from an engine which was equipped with a proper spark arrester.

The testimony showing that the Railway Company operated other engines at and about the same time that were not equipped with proper spark arresters is admissible as tending to show that the Railway Company failed to exercise ordinary care when it permitted the engines that set fire to be operated along by the cotton, for the same reason that where an employe or other person seeks to recover damages for the negligence of a Railway Company in having rotten ties in its track or a defective bridge, that it is permissible to show that there were rotten ties at other places contiguous to the place of the wreck, or that there were other defective bridges contiguous or in the same vicinity of the wreck, for the purpose of

showing that the Railway Company was negligent in failing to discover and remedy the defect complained of.

The following authorities are analogous and support the proposition that the testimony of C. L. Edwards was admissible in that it is held that where negligence is predicated upon a defective track that it is permissible to show rotten ties, defective bridges, etc., at other places contiguous to that where the derailment occurred, etc.

Railway vs. Putnam, 118 U. S. 545;
District of Columbia vs. Armes, 107 U. S. 519;
Railway vs. McDonough, 161 Fed. Rep. 657;
Screen Door Co. vs. Black, 126 Fed. Rep. 721;
Railway vs. Netolicky, 67 Fed. Rep. 665;
Railway vs. Soper, 59 Fed. Rep. 870;
Railway vs. Johnson, 54 Fed. 474.

Stated in another way, the jury has found in this particular case that one of the engines of the Railway Company set fire to and destroyed the cotton involved in the suit. The law presumes that the Railway Company was guilty of negligence in three ways:

First. That it had failed to equip its engines with proper spark arresters.

Second. That it had failed to exercise ordinary care to keep the spark arresting appliances in reasonably safe condition as regards the escape of fire therefrom.

Third. That the persons in charge of the engine and operating the engine that set out the fire, were guilty of negligence in the manner of operating the engine as regards the escape of fire therefrom.

The Railway Company must pay the loss unless it answers each of these three phases of negligence. It introduced proof that tended to answer each of them. A jury upon that proof might have reached the conclusion that the testimony of the witnesses who testified as to the manner of operating the engine showed that it was not guilty of negligence in the manner of operating the engine. The jury might have reached the conclusion that the testimony showed that it had equipped its engines with the best approved spark arresting appliances. In view of the testimony of McElroy and Pruitt as to the size of the cinders that were thrown the jury might have reached the conclusion that the spark arresting appliances were defective, but might have been in doubt in view of the testimony of the defendant's witnesses, as to whether the permitting of the spark arrester to be used in such defective condition constituted negligence; therefore it was important to show in rebuttal of the testimony offered by the Railway Company on that point that the Railway Company had failed to exercise ordinary care in keeping its engines in a reasonably safe condition, and this could be shown by showing that a number of its engines were in defective condition as regards the escape of fire therefrom.

When it is once fully appreciated that even if the engine that set the fire was identified and that it was shown that such engine was defective, that the Railway Company was entitled to a verdict if the jury should find that it had exercised ordinary care to discover and repair the defects and had failed to discover and repair them, not being guilty of a lack of ordinary care, that the defendant was entitled to a verdict; we realize that it was very important to furnish to the jury all of the testimony that could be furnished by plaintiff and defendant which showed or tended to show that the Railway Company was negligent in not discovering and repairing the defects; and in the very nature of things the most that the defendants in error could do was to show that the Railway Company was in the habit of operating engines with defective spark arresting appliances at and about the same time and place.

Those authorities that appear on slight examination to be in conflict with the principles herein announced are not in conflict in that the point involved in this case has not been carefully considered in the cases referred to.

The authorities relied upon by plaintiff in error and cited from one of the L. R. A. Reports are probably misleading in that it is frequently necessary to examine a case closely to determine whether it supports the annotations, and attention is directed to the fact that cases are there cited from only a few states as sus-

taining the proposition that where the engine has been identified that it is not permissible to offer evidence of other fires set out by other engines.

Attention is directed to the long list of authorities citing the case of *Grand Trunk Railway Co. vs. Richardson*, 91 U. S. 454, given in vol. 8, Rose's Notes on United States Supreme Court Reports, page 702, which show that the general doctrine announced in the Richardson case, that proof of other fires is admissible, has been cited with approval by a great number of state courts.

The cases cited by the plaintiff in error from the Courts of Civil Appeals of Texas are not very valuable for the Supreme Court in the case of *Railway vs. Donaldson*, 73 Tex. 124, has held that the evidence is admissible.

It occurs to me that the evidence of C. L. Edwards was clearly admissible, as it showed that a number of the engines that the railway company was operating at and about the same time were not equipped with proper spark arresters, and inasmuch as the railway company relied upon the defense that all of its engines were equipped with the same spark arrester, which was one of the approved kind, that the evidence entirely rebutted and answered the defense offered by the railway company.

In support of the contention that where the engine which set out the fire is identified, it is permiss-

ible to show that other engines set out fire or threw cinders so large as to show improper spark arresting appliances, attention is directed to the well considered case of *Dunning vs. Maine Central R. R. Co.*, 64 Am. St. Rep. 212, where it is said:

"But without regard to the question of identity, upon a careful re-examination of the decided cases, we are satisfied that the rule stated in *Thatcher vs. Maine Cent. R. R. Co.*, 85 Me. 502, is supported by reason and by the great weight of authority. We think that when the question at issue is whether, as a matter of fact, the fire was caused by any locomotive, other fires caused by defendant's locomotives, at about the same time and in the same vicinity, may be given in evidence for the purpose of showing the capacity of locomotive engines to set fires by the emission of sparks or the escape of coals. It is admissible as 'tending to prove the possibility, and a consequent probability, that some locomotive caused the fire,' language from *Grand Trunk Ry. Co. vs. Richardson*, 91 U. S. 464, which has often been cited with approval. To show a possibility is the first logical step. That other engines of the same company, under the same general management, passing over the same track at the same grade, at about the same time, and surrounded by the same physical conditions, have scattered sparks or dropped coals so as to cause fires, appeals legitimately to the mind as showing that it was possible for the engine in question to do likewise. The testimony is illustrative of the character of a locomotive as such, with respect to the emission of sparks or the dropping of coals. If the possibility be proved, other facts and circumstances may lead to a probability, and then to satisfactory proof. A simple enumeration of some of the authorities which sustain these views may be useful:

Sheldon vs. Hudson River R. R. Co., 14 N. Y. 218; 67 Am. Dec. 155; *Field vs. New York Cent. R. R. Co.*, 32 N. Y. 339; *Diamond vs. Northern Pac. Ry. Co.*, 6 Mont. 580; *Piggott vs. Eastern Counties Ry. Co.*, 3 Man. G. & S. 229; *Koontz*, 101 *vs. Oregon Ry. etc. Co.*, 20 Or. 3; *Chicago, etc., Ry. Co. vs. Gilbert*, 52 Fed. Rep. 711; *Campbell vs. Missouri Pac. Ry. Co.*, 121 Mo. 340; 42 Am. St. Rep. 530; *Smith vs. Old Colony etc. R. R. Co.*, 10 R. I. 22; *Annapolis etc. R. R. Co. vs. Gantt*, 39 Md. 124; 1 Thompson on Negligence, 163."

The proof in this case not only made a *prima facie* case against the railway company by being sufficient to authorize the jury to find that the property was set fire to and destroyed by cinders from the railway company's locomotives, but the testimony of the witnesses, McElroy and Pruitt, if true, showed conclusively that the engines that passed the cotton just before the fire broke out were not equipped with proper spark arresting appliances in that the cinders or coals of fire that were described by said witnesses as being thrown from said engines could not have escaped from an engine that was equipped with proper spark arresting appliances in a good state of repair.

Independent of the testimony of the witness C. L. Edwards, the evidence in this case was not only such as to justify the jury in finding that the railway company negligently set fire to and destroyed the property by its engines, but any other verdict would

have been inconsistent with the great weight of the disinterested and unbiased evidence in the case.

I agree with the United States Circuit Court of Appeals that there is no merit in the contention that there was error in admitting the evidence of the witness C. L. Edwards, and also that there is absolutely nothing in any of the other assignments of error, but in the event that this court should see fit to further examine the record in this cause, we submit answers to each of the assignments of error made by the plaintiff in error and presented by it in its brief in the United States Circuit Court of Appeals.

II.

Plaintiff in error contends that the verdict was not sufficient to dispose of the parties and issues in that the verdict did not mention the Marshall Compress Company.

"A verdict in favor of the plaintiff against one of the defendants is by implication a verdict in favor of the other defendants, and if the party against whom the verdict is returned is doubtful as to its effect, it is his duty to have it corrected at the time."

Aricle 1983 Revised Statutes of the State of Texas, provides: "A general verdict is one whereby the jury pronounces generally in favor of one or more parties to the suit upon all or any of the issues submitted to them."

The trial court submitted this case to the jury upon general issues, and authorized the jury to return a verdict in favor of the plaintiffs in the trial court against the Texas & Pacific Railway Company, or against the Marshall Compress Company, or in favor of all of the defendants in the trial court. Under no phase of the case were the defendants in error permitted to recover against the railway company and the occasion of the fire for a great number of years; and disposed of by the decision of the Supreme Court of the State of Texas in the case of *Gulf, Colorado & Santa Fe Ry. vs. James*, 73 Tex. 18, 10 S. W. R. 745, where it is said:

"Under the first assignment the objection is made that the verdict is not responsive to the charge, which directed the jury, in the event their verdict should be against some of the defendants and not all of them, the verdict should state the defendant or defendants against and in favor of whom the jury should find. This objection is one which, we think, goes rather to the form than the substance of the verdict. All of the defendants were sued, and the verdict was in plain language, in 'favor of the plaintiff against the defendant the Gulf C. & S. Fe Ry. Co.' The verdict, by necessary implication, found in favor of the defendants Snyder and Spillane. If they entertained any doubt as to that it could have been corrected at the time. There was certainly no ambiguity in the verdict as to appellant. In cases where the verdict was not altogether certain, it has been uniformly held in this state that it should be upheld when its meaning can be made manifest beyond doubt by reference to the entire record."

This same doctrine is announced in a great number of cases, but it is self-evident and I do not consider it necessary to discuss it further.

III.

The plaintiff in error asserts that a verdict should have been directed for the plaintiff in error for the reason that the cotton that was ignited and from which the fire spread was located on a part of the compress platform that was on the right of way of the railway company, and that it was negligence as a matter of law for the compress company to place cotton at that place.

In support of this doctrine Texas authorities are relied upon, which hold in effect that if the railway company permits combustible material to accumulate on its right of way and sets fire thereto, which spreads to other property, that the railway company is liable for the value of the property destroyed.

In this case the cause of action relied upon by the defendants in error was that the plaintiff in error was negligent in the construction of its engines as regards the escape of fire therefrom, in its failure to exercise ordinary care to keep its engines in a proper state of repair, and in that it failed to exercise ordinary care in the operation of its engines as regards the escape of fire therefrom.

This question raised by plaintiff in error, like the other points relied upon by the plaintiff in error,

is directly met and answered by a decision of the Supreme Court of the United States in the case of *Grand Trunk Railway Co. vs. Richardson*, 91 U. S. 454, where it is said on page 471:

"It is contended further on behalf of the defendant that there was error in the court's refusal to direct a verdict in its favor because a large part of the property destroyed was wrongfully on their railway, and not within the purview of the statute of Vermont, on which the plaintiff relied. If, however, we are correct in what we have heretofore said, it was not for the court to assume that any part of the property was on roadway wrongfully, and to instruct the jury on that assumption; and, even if it had been wrongfully there, the fact would not justify its destruction by any willful or negligent conduct of the defendant. In *Bains vs. R. R. Co.*, 42 Vt. 380, it was said that a railroad company in the discharge of its duties, and in the exercise of its right to protect its property from injury to which it is exposed by the unlawful act or neglect of another, is bound to use ordinary care to avoid injury even to a trespasser. If this be the correct rule (and it cannot be doubted) how could the Circuit Court have charged as a conclusion of law that the plaintiffs could not recover because their property was wrongfully within the lines of the defendant's roadway?"

And on page 473:

"Exception was taken at the trial to the refusal of the court to affirm the defendant's points; the first of which was that 'If the jury should find that the erection of the plaintiffs' buildings, or the storing of their lumber so near the defendant's railroad track, as the evidence showed, was an imprudent or careless

act, and that such a location in any degree contributed to the loss which ensued, then the plaintiffs could not recover, even though the fire was communicated by the defendant's locomotive.' We think the court correctly refused to affirm this proposition. The fact that the destroyed property was located near the line of the railroad did not deprive the owners of the protection of the statute, certainly, if it was placed where it was under a license from the defendant. Such a location, if there was a license, was a lawful use of its property by the plaintiffs; and they did not lose their right to compensation for its loss occasioned by the negligence of the defendant. *Cook vs. Champlain Transp. Co.*, 1 Den. 91; *Pere vs. Railroad Co.*, 22 N. Y. 215. Besides it was not for the court to affirm that even an imprudent location of the plaintiffs' buildings and property was a proximate cause of the loss."

The pertinency of the decision in the Richarson case will be fully appreciated when it is remembered that the facts in this case show that the compress was erected along side the railroad of the plaintiff in error at a place where it was satisfactory to the railroad company in that the railway company constructed a spur track to the compress, and that the compress had been there for a great number of years, and that the platform thereof had been used for storing and handling cotton just as it was upon the occasion of the fire for a great number of years; all of which must necessarily have been with the license and permission of the railway company; and certainly without objection from the railway company for a great number of years. Also that the

compress was a valuable acquisition to the railway company, as it furnished large quantities of freight which could be most certainly controlled by the railway company by having the compress located upon its tracks.

The manager of the compress company, B. C. McElroy, testified, Transcript of Record, page 95:

"In handling cotton we usually placed it on the platform. I placed this cotton in the usual place on the platform and placed it there in the usual way."

On page 97 same witness testified:

"In my judgment the fire originated about midway of the west platform between the coal house and the extreme western edge of the platform and about 22 to 24 feet from the south edge of the platform."

The railroad was located on the south side of the platform and ran east and west. See map, Transcript, page 112.

The same witness again testified on page 99:

"At the time of the fire there was no cotton on the runway. The runway is used for loading and unloading cotton:

And on page 98 he testifies:

"Mr. Pruitt came to me and spoke of the cinders falling when the passenger train went by, and I went with him down to the runway and remained there until the freight train passed. After the freight train passed I started to go to the west side and saw

the smoke. A good many cinders were falling from the freight train, and I started to the west end of the platform as a matter of precaution. It is hard to describe the size of the cinders that were falling; they were of different shapes, they were not uniform; they ran from a very small cinder to a very large one. The largest ones at the biggest place would be as large as the end of either of my fingers."

And also: "The size and quantity of cinders that fell from the freight engine was very unusual."

On page 90 this witness says:

"There is no other way that the fire could have started that I know of. Cinders must have gone beyond the runway to set the cotton afire because there was no cotton on the runway."

The railway company knew of and acquiesced in the location and use of the compress and its platforms for years without objection. The location was agreeable and beneficial to it in that it made it more probable that the cotton would be shipped out over the road than if it had been located away from the road. It had acquiesced in the storage of cotton upon the platform for years, and as the trial court only held it responsible for the value of the cotton in the event the jury should find that it was set on fire by the negligence of the railway company, it cannot complain. It was familiar with the situation of the cotton and was certainly required by law to exercise just such care as the trial court imposed in the instruc-

tions to the jury. The jury found that the cotton was set on fire by its negligence, and the finding is abundantly sustained by the evidence.

The plaintiff in error also contends that the trial court should have instructed the jury in substance:

"If you believe that a portion of the platform of the compress company was on the right of way of the Texas & Pacific Railway company, and you believe that the railway company permitted the use by the compress company of that part of the platform on its right of way for the purpose of loading and unloading cotton on or from said cars, but the railway had not agreed to the use of that part of the platform by the compress company for the purpose of storing cotton, and if you find that the cotton where the fire started was on the railroad right of way, then the railway would not be liable."

This contention is answered as follows:

First—The uncontroverted proof shows that the Texas & Pacific Railway Company permitted the use by the compress company of that part of the platform on its right of way where the fire broke out, for the purpose of storing and handling cotton just as the cotton was being handled on the day of the fire, in that the continued use thereof by the compress company for more than ten years in the absence of proof by the railway company to the contrary, raises an unanswerable presumption in favor of a direct license from the railway company to the compress company to so construct and use its platform.

Second—If there had been no direct license by the railroad company to the compress company for such use of the platform, the fact that the compress company has used the platform without objection from the railway company would charge the railway company with the duty of exercising ordinary care to prevent injury to the property stored thereon.

Third—The charge of the trial court made the right of defendants in error to recover depend upon the railway company having been negligent in failing to equip its engines with proper spark arresting appliances or in failing to exercise ordinary care to keep such spark arresting appliances in reasonably safe repair, or in failing to exercise ordinary care in the manner of the operation of its engines as regards the escape of fire therefrom.

The trial judge instructed the jury that the defendants in error could not recover unless the plaintiff in error had by its negligence, started the fire that resulted in the loss of the cotton. Also that if the compress company had been guilty of any contributory negligence in the manner of handling the cotton or the place where the same was stored, that the plaintiff in error would not be liable even though it negligently set fire to and destroyed the cotton. Also that in passing upon the negligence of the railway company or the contributory negligence of the compress company that the jury would take into consideration the location of the compress platform, the

manner in which the cotton was placed thereon, considering the nearness thereof to the track, and all of the facts and circumstances in connection with the destruction of the property.

The plaintiff in error contends that a new trial should be awarded for the reason that it claims it met the *prima facie* case of negligence made by defendants in error showing the destruction of this property by fire from its engines, in that it showed by its employes that its engines were equipped with proper spark arresting appliances and that it had exercised ordinary care to keep them in a reasonably safe condition as regards the escape of fire therefrom, and that it had exercised ordinary care in the operation of its engines as regards the escape of fire therefrom.

There was a signal failure, in my opinion, to show that ordinary care was exercised in the operation of the engines in that the proof shows that the engines were operated along by the platform with the maximum amount of steam, which increased the discharge of cinders, and that the fireman was shoveling coal into the firebox at the time the freight train was passing the platform, which had the effect of stirring up the fire and increasing the discharge of cinders.

The contention of the plaintiff in error is without merit in that the property owner makes out a *prima facie* case of negligence by convincing the jury that his property was destroyed by fire that escaped

from the engines of the railway company. This *prima facie* case is not absolutely destroyed and answered by the testimony of the employes of the railway company which disputes the *prima facie case*, but it raises an issue of fact to be determined by the jury, like all other questions of fact, and the jury may conclude from the history of the fire and the manner of its starting, etc., that the testimony of the rebutting witnesses is not true. This is illustrated and emphasized by the following authorities:

Thompson on Negligence, Secs. 2284-5-7-8-9, also Sec. 2290.
Eddy vs. LaFayette, 163 U. S. 456.
Ry. Co. vs. Coats, 53 U. S. C. C. A. 382.
M. K. & T. Ry. of Texas vs. Carter et al., 68 S. W. R. 159.
Texas & P. Ry. Co. vs. Rice et al. 59 S. W. R. 833.
H. & T. C. Ry. Co. vs. Ellis, 134 S. W. R. 246.

See Presumptive Evidence, Greenleaf on Evidence, Vol. 1, Sec. 33-48, holding that the evidence which disputes a *prima facie* case only raises an issue of fact to be passed upon by the jury. O'Eney of Evidence, pages 85-880.

Maggie McCullen vs. Ry. Co., 101 Fed. 66 (49 L. R. A. 642) rebuttal of presumption by testimony of employes of railway company, raises issue of fact, and the case must be submitted thereon.

However, in this particular case it is not necessary to rely upon the legal proposition announced by these authorities for the very good reason that the testimony of witnesses, B. C. McElroy and J. M. Pruitt, show that the chunks of fire that were discharged upon the cotton platform by the engines that passed immediately before the fire were so large that it was impossible for them to have escaped from an engine that was equipped with a proper spark arrester in a fair state of repair. Thus B. C. McElroy says, Transcript, page 98:

"A good many cinders were falling from the freight train. * * * * * It is hard to describe the size of the cinders that were falling. They were of different shapes. They were not uniform. They run from a very small cinder to a very large one. The larger ones at the highest place would be as large as the end of either of my fingers."

The witness, J. M. Pruitt, testified, Transcript, 45:

"When the second train passed the cinders fell all over me and around on the platform. The cinders were of various sizes. I suppose they would run from very small, something like a pin head, up to the size of the end of my thumb or something like that. I mean the size from the first joint of my thumb to the end. That is the only way I know to describe their size."

The engine here referred to was the freight engine that passed the platform immediately before the fire broke out.

On page 53 this witness says:

"The end of my thumb measures an inch across. To be exact, it is 15-16 of an inch."

The witness, C. L. Edwards, who made an investigation of the loss for the Intervenors' Insurance Companies, testified that while making that investigation, and a few days after the fire, that engines passing the compress going up the grade west (as were the engine that set the fire), threw large cinders, some of which were exhibited by him before the jury, and were larger than could have passed through the spark arresting appliances of an engine in proper condition as regards the escape of fire therefrom. That several engines threw large cinders of this class. Transcript, 104-5-6.

I am convinced that it is perfectly apparent to the court that there is no merit in the contention of the plaintiff in error that the verdict was insufficient to support the judgment, and that there is no merit in the contention that the defendants in error are debarred of the right to recover by reason of contributory negligence, which was an issue of fact determined by the jury against the plaintiff in error; and I feel that it is clear that there is no merit in the contention that the trial court committed error in admitting the evidence of the witness, C. L. Edwards, and I further call attention to the fact that if there was error in the admission of this evidence that it

was harmless, as the evidence of the witnesses McElroy and Pruitt showed that the cinders that were being thrown by the trains that passed the compress immediately before the fire were such that they could not have escaped from an engine equipped with proper spark arresters in proper condition.

The proper judgment has been reached in this cause, there being no errors, the judgment should be in all things affirmed.

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Marshall, Texas;
WM. THOMPSON,
J. S. PATTERSON,
Dallas, Texas;
Attorneys for Defendants in Error.

Office Supreme Court, U. S.
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IN THE
Supreme Court of the United States

TEXAS & PACIFIC RAILWAY COMPANY,
Plaintiff in Error,
vs.
WYATT JONES ROSBOROUGH AND INSURANCE COMPANIES, INTERVENORS,
Defendants in Error.

No. 35

SUPPLEMENTAL BRIEF FOR DEFENDANTS IN ERROR.

By S. P. JONES,
Marshall, Texas.

IN THE

Supreme Court of the United States

TEXAS & PACIFIC RAILWAY COMPANY,
Plaintiff in Error,
vs.
WYATT JONES ROSBOROUGH AND INSURANCE COMPANIES, INTERVENORS,
Defendants in Error.

SUPPLEMENTAL BRIEF FOR DEFENDANTS IN ERROR.

The defendants in error submit this short supplemental brief in answer to the brief of plaintiff in error which asserts that evidence of other engines at the place of the fire shortly after the fire, throwing cinders so large that it showed defective condition of the spark arresters thereof was not admissible.

In addition to the authorities cited in brief of defendants in error accompanying their motion to dismiss or affirm, and sustaining the proposition that the question of the character and condition of the fire arresting appliances used by the defendant at the time of the fire, and the possibility of communication of fire by large cinders being an

issue, the evidence that other engines operated by the plaintiff in error at the same place and about the same time, had defective spark arresting appliances, in that the cinders described could not have passed through a spark arresting appliance in good repair, was admissable, I cite the following authorities:

McKelvey on Evidence, 2 Ed. page 184.

Freeman vs. Nathan, 149, S. W. R. 248.

ARGUMENT.

In my judgment a careful examination of the authorities sustains the general proposition that where it has been shown that the fire was probably set by a locomotive, that evidence of other locomotives at or about the same time and place setting fire or throwing large cinders is admissable. Also that where the evidence shows that some locomotive set the fire, that such evidence is admissible and that where the evidence shows that a particular locomotive set the fire, that evidence to the effect that other locomotives, some or all of them, operated by the railway company at the same place and about the same time threw cinders of such size that it showed that the spark arresting appliances thereof were defective, is clearly admissible for the purpose of showing the negligent manner of conducting the business of the company as regards the equipment and repair of the spark arresting appliances of its engines.

We quote McKelvey on Evidence as follows:

"It is now very generally held that, for the purpose of showing the character of the engines

used by the defendant, and thus as indirectly bearing upon the question of its negligence, in connection with testimony showing what are safe and proper engines, evidence of the manner in which the engines worked at other times is admissible. There are several distinctions which should be noted in this class of cases. There are always two facts to be proved—the setting of the fire and the negligence. It is the better opinion that evidence of this character is admissible upon both questions. There are cases, however, which have proceeded upon the theory that the evidence was admissible as showing the possibility that the defendant's engines could have set the fire, but not admissible for the purpose of showing defendant's negligence. There is another distinction also to be made between cases where a particular engine is identified and charged with setting the fire and cases where the fire is charged generally against the defendant, but the particular engine is unknown. In the latter case, evidence as to the manner in which any engine of the company operated is admissible; while in the former case some authorities hold that the charge of negligence being confined to a single engine, the evidence must be confined to that particular engine. It would seem, however, that in either case the evidence ought to be admitted on the question of

the possibility of communication of fire; and if there is any merit in the doctrine frequently laid down that in the operation of a railroad a unity of management and similarity in construction of the appliances used is to be presupposed, the evidence would seem admissible also upon the point of negligence."

Inasmuch as the plaintiff in error relies upon the decisions of the intermediate courts of appeal in Texas (the Courts of Civil Appeals) we direct attention to the case of Freeman vs. Nathan 149, S. W. R., which opinion has met the approval of the Supreme Court of Texas, in that writ of error was denied where it is said on page 258:

"Appellant's contention is that, as the engine which caused the fire in question was identified as No. 122, it was error to admit testimony tending to show that other engines, on other occasions, had set out fires at other places on appellant's road, in the absence of proof of similar conditions with respect to places, appliances of other engines, tonnage of train, load hauled, mode of operation, and other similar conditions. The plaintiff submitted testimony tending to show that the defendant had permitted grass and weeds to accumulate upon its right of way, and that the fire originated in the combustible matter referred to. No witness testified to seeing sparks which escaped from the engine

fall to the ground and set fire to the combustible matter thereon, and the plaintiffs relied upon circumstantial evidence as proof of that fact. In other words, the fire was discovered upon the right of way soon after the train, pulled by engine 122, had passed. The plaintiff alleged in his petition that the fire was caused by sparks escaping from that engine, and that averment was met by a general denial by the defendant. The plaintiff contended, and introduced evidence tending to show, that because of the curves and steep grade near the plaintiff's premises the defendant's engines were required to labor excessively and exhaust heavily while passing, and that this was true of the engine in question; and therefore the plaintiff contended it was probable that the fire in question was caused by sparks from the engine. The defendant contended that, if the exhaust was heavy, the sparks would be thrown higher into the air, and, in all probability, would be extinguished before reaching the ground; and evidence was introduced tending to support that contention. The other fires testified to by the witnesses were at or near the same place, and proof of them tended to controvert the defendant's and support the plaintiff's theory, and for that reason such proof was admissible. Dunning vs. Maine C. R. Co., 91 Me. 87, 39 Atl. 352, 64 Am.

St. Rep. 208; Campbell vs. Missouri Pac. Ry. Co. 121 Mo. 340, 25 S. W. 936, 25 L. R. A. 175, 42 Am. St. Rep. 530; Smith vs. Old Colony & N. R. Co. 10 R. I. 22; A. & E. R. R. Co. vs. Gantt, 39 Md. 115; Koontz vs. Oregon Ry. & Nav. Co., 20 Or. 3, 23 Pac. 820; Hawley vs. Sumpter V. R. Co., 49 Or. 509, 90 Pac. 1106, 12 L. R. A. (N. S.) 1256; Sheldon vs. Hudson River Ry. Co., 14 N. Y. 218, 67 Am. Dec. 155; Illinois Cent. R. Co. vs. Scheible (Ky.) 72 S. W. 325; Diamond vs. N. Pac. Ry. Co., 6 Mont. 580, 13 Pac. 367; N. Y. P. Y. N. R. Co. vs. Thomas, 92 Va. 606, 24 S. E. 264; St. L. & S. F. R. Co. vs. Shannon, 25 Okl. 754, 108 Pac. 401, 21 Ann. Cas. 1269; Piggot vs. Eastern Counties Ry. Co., 3 C. B. 229, 3 Man., G. & S., 229; Grand Trunk Ry. Co. vs. Richardson, 91 U. S. 454, 23 L. Ed. 356; Sims vs. American Ice Co., 109 Md. 68, 71 Atl. 522; Chicago, St. P. M. & O. Ry. Co. vs. Gilbert, 52 Fed. 711, 3 C. C. A. 264; Northern Pacific Ry. Co. vs. Lewis, 51 Fed. 658, 2 C. C. A. 446; G. C. & S. F. Ry. Co. vs. Johnson, 54 Fed. 474, 4 C. C. A. 447."

I call attention to the fact that the testimony of C. L. Edwards showed that the locomotives of the Railway Company which were operated along the same place near the time of the fire were not equipped with spark arresting appliances in a proper condition of repair as regards the escape of fire therefrom, in that the cinders that he describ-

ed were so large that they could not have passed through the spark arresting appliances which the plaintiff in error claims that all of its engines were equipped with, if such appliances had been in a proper state of repair.

An examination of the testimony in this case discloses the fact that the witnesses J. M. Pruitt, Transcript 45 and 53, and B. C. McElroy, Transcript 98, not only showed that the engines that passed the cotton immediately before the fire broke out were throwing sufficient fire to have set the cotton on fire, but also showed that the cinders that were being thrown by these locomotives were so large that they could not have escaped from locomotives with proper spark arresting appliances in good repair, and therefore showed that the railway company had been negligent in the equipment or repair of the engines as regards the spark arresting appliances thereof.

It necessarily follows that the plaintiff in error cannot complain of the verdict in this case, for the testimony of the witness, C. L. Edwards, was admissible, but if it should be held not admissible the evidence of the defendant in error was sufficient to sustain the verdict; in fact the great preponderance of the evidence was in favor of the defendants in error, and the verdict of the jury upon the facts should not be disturbed.

Therefore the defendants in error having made a case showing that the spark arresting appliances of the locomotive that set the fire were in a defective condition, and that about the same time the railway company was using

other locomotives with spark arresting appliance out of repair, we submit that the judgment should be affirmed.

S. P. JONES,

Attorney for defendants in error.

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In The United States Supreme Court

THE TEXAS & PACIFIC RAILWAY COMPANY,
Plaintiff in Error.

vs.

WYATT JONES ROSBOROUGH & INSURANCE COMPANIES INTERVENORS,
Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.

By F. H. Prendergast,
Marshall, Texas.

W. L. HALL, Dallas, Texas, Counsel.

TEXAS & PACIFIC RAILWAY CO.
Plaintiff in Error.

vs.

WYATT JONES ROSBOROUGH
Defendant in Error.

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In The United States Supreme Court

THE TEXAS & PACIFIC RAILWAY COMPANY,
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vs.

WYATT JONES ROSBOROUGH & INSURANCE COMPANIES INTERVENORS,
Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.

By F. H. Prendergast,
Marshall, Texas.

Wyatt Jones Rosborough filed suit in the District Court of Harrison County, Texas, for Thirty-four Thousand Dollars, ($34,000.00) being the value of cotton destroyed by fire while it was located at the Marshall Compress, in Marshall,

Texas, on the 8th day of March, 1910, a portion of the cotton had been insured and after the suit was filed, the Insurance Companies paid Rosborough a portion of the value of the cotton and took an assignment of Rosborough's cause of action against any person whose negligence may have caused the destruction of the cotton. The cause was removed to the United States District Court by the Texas & Pacific Railway Company and tried on October 8, 1912, verdict was rendered for Rosborough for Fifteen Thousand Three Hundred and Fifteen Dollars ($15,315.00) and for the Insurance companies under their subrogation contract, for Eighteen Thousand Nine Hundred and Eighty-one ($18,981.00) Dollars.

The Texas & Pacific Railway Company sued out a writ of error and carried the case to the United States Circuit Court of Appeals of the Fifth Circuit, where the judgment was affirmed in December, 1913. The Texas & Pacific Railway Company had brought the cause here by writ of error. The defendants in error have filed a motion here to affirm or dismiss in order to get it on the docket to be tried at an early day.

The assignment of errors raised the point as to the admissibility of certain evidence of C. L. Edwards, who testified over the objection of the Railway Company that he saw engines of the defendant company passing the compress and throwing fire three days after the destruction of the cotton. The admisibility of this evidence is the subject of the first assigned error, and the other errors are all assigned to the court's refusal to give certain requested instructions to the jury.

The plaintiffs in error think that this cause should not be decided without the full hearing and without oral judgment, if the same is permitted by the court, because the amount involved is large and the questions involved are not of ready solution, which will be at once demonstrated by the great length of the brief by the defendant in error on its motion to affirm.

The plaintiff in error assigns the following errors to be reviewed by this court:

FIRST.

The Court erred in not sustaining the first assigned error which is as follows:

The Court erred in admitting the evidence of C. L. Edwards, witness for the plaintiff, said evidence being in substance as follows:

"I came to Marshall a day or two after the fire that destroyed the cotton, the value of which is involved in this suit. I came to Marshall as the representative for the Insurance Companies which had issued policies for fire insurance covering said cotton. The fire was on the 8th day of March, and I came on the night of the ninth (9) of March, and was at the Compress on the platform, near where the cotton was burned on March 11th, and other days after the 11th.

"I watched trains passing on the Texas & Pacific Railway more or less during the days during my stay, this was in the day time and I couldn't well see sparks from the engines, but quite a number of cinders fell and I gathered up a great many of the cinders I saw fall. I have a cinder here imbedded in a piece of cotton. I saw it fall and took the cinder up immediately after it fell. This cinder fell on a bale of cotton to the eastward of the Compress building on the platform, there was a bale of cotton on the platform lying on its side with the oval side up, the cinder struck on the oval side of the bale and bounded into a little depression that appeared to have been made in sampling the bale of cotton and remained there until I took it up. I took up the cinder with some of the cotton under it, which cotton was scorched. I picked up other cinders on the platform. I saw this cinder fall just as the train was passing.

"I took up other cinders. This cinder by actual measurement is 5/8 of an inch the long way, the other is 3/4 of an

inch long and 7-16 of an inch wide. I saw these cinders fall one of the five days I was at the Compress after the fire, making the investigation, the other one I saw fall on March 11, 1910."

The admission of this evidence was error for the following reasons:

1. Because the same was offered after the plaintiff had once closed his case and after the defendant had introduced its evidence and closed its case, and said evidence was not in rebuttal of any evidence introduced by defendant.

2. Because the engine that started the fire had been identified by the evidence as being the switch engine No. 140 or the freight engine No. 202, or the passenger engine No. 359, and said testimony offered had no relation to the condition of either of those engines, and it is not claimed that either of the engines seen by the witness to pass the Compress after the fire was the engine that set the cotton on fire. These objections were made when the evidence was offered.

SECOND.

The Court erred in not sustaining the third assigned error, which is as follows:

The Court erred in refusing the following instructions requested by the defendant:

It appears that the place where the fire was was on the right-of-way of the railway company.

And there is no evidence that the Railway Company had any control of the cotton.

Therefore the fact that the cotton was on the right-of-way resulted in its being burned.

Therefore the Railway Company is not liable.

THIRD.

The Court erred in not sustaining the fourth assigned error which is as follows:

The Court erred in refusing the following instructions requested by the defendant:

If the jury believe from the evidence that sparks from a Texas & Pacific Railway engine set the cotton on fire, still that company would not be liable for the destruction of the cotton if the Compress company failed to use ordinary care to protect said cotton from sparks from the railway engine, and in determining whether the Compress Company was negligent may consider the known combustibility of cotton when baled or loose, and exposed without covering of bagging and its proximity to the railroad, and that it was on the side of an ascending grade on the railroad, where more sparks are thrown than on lever ground."

FOURTH.

The Court erred in not sustaining the Fifth assigned error which as as follows:

The Court erred in refusing to follow instructions requested by the defendant:

If you believe that a portion of the platform of the Compress company was on the right-of-way of the Texas & Pacific Railway Company, and you believe that the railway permitted the use by the Compress company of that part of the platform on its right-of-way for the purpose of loading and unloading on or from said cars, but the railway had not agreed to the use of that part of the platform by the Compress company for the purpose of storing cotton and if you find that the cotton where the fire started was on the railway right-of-way then the railway would not be liable.

FIFTH.

The Court erred in not sustaining the Sixth Assigned error which is as follows:

The Court erred in refusing the following instructions requested by the defendant:

It appears in the case that plaintiff Rosborough delivered the cotton to the Marshall Compress company, and the Compress company placed said cotton on the platform, not covered by any roof and not covered at all except to the extent that you find the bales may have been covered by bagging.

Now if a person of ordinary prudence would not have placed the cotton there, and the cotton being there was a proximate cause which concurring with the negligence of the railway (if the railway was negligent) caused it to be burned, then plaintiff can not recover even though you find the railway was negligent, and no matter how negligent you find the railway to have been.

SIXTH.

The Court erred in not sustaining the Seventh Assigned error which is as follows:

The Court erred in refusing the following instructions requested by the defendant:

Gentlemen of the Jury:

You are instructed that the defendant, the Texas & Pacific Railway company, was not under the duty to so equip its locomotives and operate them as to absolutely prevent the escape of sparks which might send out fire, and although if you should find from the evidence that the fire complained of, was caused by sparks from one of the engines, still, if you further believe from the evidence that whatever locomotive the sparks, if any, came from was equipped with what is known as a spark arresting appliance, and that said company had exercised ordinary care to equip same with one of the best appliances of the kind in general use on railroads in this country, and was in the exercise of ordinary care to keep the same in repair, and that at the time complained of, the locomotive was being operated with ordinary care so as not to cause it to throw any more sparks than would result in the necessary use of said locomotive for the purposes it was being used at the time, then it will be your duty to find for the defendant, the Texas & Pacific Railway Company.

SEVENTH.

The Court erred in not sustaining the Eighth Assigned error which is as follows:

The Court erred in refusing the following instructions requested by the defendant:

Gentlemen of the Jury:

You are instructed that if you believe from the evidence that the plaintiff, W. J. Rosborough, caused his cotton to be placed with the Marshall Compress company at its Compress and that at the time of the fire complained of, and prior thereto, said Compress Company had the custody or care of said cotton for said plaintiff, and if you believe from the evidence that said Compress Company had other cotton at its Compress and that plaintiff's cotton and said other cotton was on its platform at its Compress and that said Compress either caused or permitted any of the plaintiff's cotton or any other cotton which it had at its Compress to be placed out on an open platform so close to the railroad as to render it in danger of catching fire from sparks coming from a passing locomotive; or if you believe it permitted or left loose cotton on or over its platform or left bales of cotton exposed with the top ends uncovered which was likely to catch fire from sparks coming from a passing locomotive, and if you believe that the acts, if any, or omissions, if any, on the part of said Compress company in relation to said cotton, was such as a person of ordinary prudence would not have done or left undone in view of the probable danger of fire from passing locomotives, if such danger was probable, and if you further believe that such acts, if any, or omissions, if any, contributed to cause said cotton to catch fire, and that said fire destroyed the cotton involved in this suit, then you will find for the defendant, although you may believe from the evidence that the defendant was also guilty of negligence but for which fire would not have occurred.

We pray for a reversal of the judgment.

Before proceeding to discuss the specific objections to the judgment we have raised by our assignments of error, we deem it proper to place before the court in a general way, the main facts of the case and the situation of the cotton at the time of the fire. The Compress is a building some one hundred feet square enclosed with a wall and roof, it is about the middle of the platform, which entirely surrounds the Compress building, the platform being three or four hundred feet east and west and about two hundred feet north

and south. The Texas & Pacific runs on the south side of the platform running east and west, a spur track branches off from the main line of the Texas & Pacific near the southeast corner of the platform, and diverges to the northwest going along the south margin of the platform. Sixteen feet on the south edge of the platform, is called the run way and is kept clear of all cotton in order to be used to load and unload cars on the spur track. The railroad owns one hundred feet right of way on the north side of the main line, and the north margin of the right of way is forty-two feet north of the south edge of the platform, so a strip forty-two feet wide of the platform is on the railroad right-of-way, and the south edge of the platform is fifty-eight feet from the main line of the railroad. (Rec. 43). The cotton that first caught fire was eighty-four feet from the main line of the Texas & Pacific. (Rec. 93.) So the fire started sixteen feet over on the railroad right of way, that is, sixteen feet from the north margin of the right of way. It is up grade to the west passing the compress. (McElroy's testimony Rec. 101). There was a high wind blowing at the time from the south. (Rec. 93). Plaintiff Rosborough testified that he owned the cotton and had sent it to the Compress company to be put in condition for market and compressed. The cotton had been on the ground in the cotton yard, exposed to the weather, and the ends that were on the ground would be damaged. It was understood that the Compress Company was to remove the damaged cotton and fix up the ends of the bales where they were damaged. He testified also to the value of the cotton in compliance with the verdict.

J. M. Pruitt, a cotton man, who was in the employ of the man who had purchased the cotton from Rosborough, was there on the platform weighing and sampling the cotton. (Rec. 47).

He says: I saw some bales of cotton with the ends exposed. (Rec. 49). I saw some loose cotton scattered around over the northwest part of the platform. (Rec. 49). In order to put the cotton in condition, they took one hoop off, picked out the damaged cotton and put the hoop back

on. (Rec. 50). I saw one passenger train pass up the hill going west, pushed by a switch engine. In about fifteen minutes, the switch engine returned and pushed a freight train over the hill to the west and just as the switch engine passed the compress it gave the alarm, and Pruitt saw the fire on the west end of the platform. (Rec. 47). Mr. Mr-Elroy was the manager of the Compress and Pruitt called his attention to the danger of the sparks from the engines, as the cinders were falling on the platform. (Rec. 53).

Kittie White testified that she saw what was called big head bales standing on end, that is, bales that the top has been taken off. (Rec. 56). The engine pulling the passenger train was No. 359. It had been in the shops for several weeks for repairs and had just come out with a new spark arrester, and B. King testified that he inspected and found it in good condition. (Rec. 60). The switch engine was No. 140 and B. King inspected that engine soon after the fire and found its spark arrester in good condition. (Rec. 61).

The engine pulling the freight train was No. 202. It ran out of Longview and F. Rodick, the inspector at Longview inspected that engine's spark arresting apparatus; a few hours after the fire he received a message at Longview, from Marshall, stating that the cotton was burned and ordered him to make an inspection of engine 202. (Rec. 63).

M. W. Stokes, foreman of the Boiler Shops at Marshall, testified that he furnished the material to repair engine 359 and engine 140, had them inspected and they were in good condition.

George Pearsall, boilermaker for the Texas & Pacific, at Marshall, he explained the construction of engine 359 and 140 and stated that he inspected them soon after the fire. (Rec. 73).

Le Baum testified that he was engineer on the switch engine that pushed the other two trains over the hill, and he first discovered the fire and gave the alarm; in operating his engine on that occasion he did nothing but what was necessary to properly operate his engine. (Rec. 75).

Maxfield was the engineer of the freight engine 202, he testified that he did nothing except what was proper and necessary to pull the train over the hill. (Rec. 78).

Ramsey was the engineer of the passenger train, and said that he did nothing except what was necessary to properly operate his engine and pull the train over the hill. (Rec. 80).

Harris was the fireman on the freight engine 202 and stated that he did nothing except what was proper and right to keep steam up in the engine. (Rec. 82).

The railroad proved that they had a deed to the right of way, one hundred feet wide on the north side of the main line where the Compress is. (Rec. 82).

Geo. H. Langton testified he was Master Mechanic of the Texas & Pacific at Marshall and had charge of the motive power. "I know the character of spark arresting appliances used by the Texas & Pacific, and we call it the Standard Front end, so called because it was adopted by the Master Mechanics' Asosciation. They adopted this character of spark arrester at their meeting in Atlantic City about seven or eight years ago." He described fully the construction of the spark arrester. There are some roads that use a steel plate, which is perforated, but the witness had objections to the steel plate. He described fully the character of wire used to make the netting. (Rec. 89-90).

E. C. McElroy, the manager of the Compress, testified that there was a high wind blowing from the south. Rec. 98). The cotton had been out on the platform two or three days before the fire occurred. (Rec. 100). It is up grade at the point passing the compress. (Rec. 101). Some of the cotton which was on the west platform, come out of the press room and had been on the west end of the platform two or three days before the fire. I could not state whether the cotton that burned all came from the cars, or partly from the cars and partly from the press room. (Rec. 100).

We brought some of the cotton where the fire occurred out of the cars and some of it out of the press room. Rosborough had sold his cotton. Robertson's cotton was there

mixed with Rosborough's but he had not sold his. (Rec. 100).

There is a run way along the south margin of the platform, along the side of the spur track, and this is connected with the main platform of the compress, there was no cotton on this run way. It is used for loading and unloading cotton. (Rec. 87-98).

The cinders falling there at the time were unusual, both in size and quantity.

To sum up the situation, we have to start with the following facts:

First, the Compress is on a rather steep grade, on the side of the railroad, that it had built its platform partly over on the right of way of the railroad, that it had stored cotton on that part of the platform which was on the railroad right of way, that it did not show any permission to use the right of way for the purpose or storing cotton on it. It may conceded that it had a right to connect its platform with the run way, used for loading, but there is no permission shown for the Compress company to use it for storing cotton. There was a high wind blowing directly from the passing engines toward the cotton. The engines on the Texas & Pacific use coal instead of oil. The manager had often seen cinders fall on the platform where the cotton was, but not so large as fell on the day of the fire. This may be accounted for by the fact that the high wind brought the large cinders to the platform, which it did not do in an ordinary breeze. That cotton is combustible. That the best equipped engines when using coal as fuel throw some sparks.

IN A SUIT FOR THE VALUE OF PROPERTY DESTROYED BY FIRE STARTED BY SPARKS FROM A LOCOMOTIVE ENGINE WHERE THE ENGINE THAT STARTED THE FIRE IS IDENTIFIED, IT IS NOT PERMISSIBLE TO PROVE THAT OTHER ENGINES AT OTHER TIMES THROW SPARKS SUFFICIENT TO START THE FIRE.

In the case at bar, the plaintiff sued for the value of cot-

ton destroyed by fire. He introduced evidence showing the value of the cotton and sufficient to show that sparks from one of three engines started the fire. The defendant introduced evidence showing the number of the three engines in question, that their spark arresting devices were in good condition, that they were operated carefully at the time of the fire, which occurred on March 8, 1910. The plaintiff then, over the objection of the defendant, proved that an engine passed the place where the fire occurred March 11th, 1910, three days after the fire, and that it threw large quantities of burning cinders sufficient to have started the fire in the cotton. The defendant objected to this evidenec, first, because it was not in rebuttal, and we think it clear that the evidence was not in rebuttal. Evidence to have been in rebuttal, must have limited, qualified or disproved the evidence of the defendant as to the condition and operation or handling of the three engines, 359, 140 and 202, but this evidence offered did not tend in the least to show the condition of either one of these engines, nor did it tend to show that the engines were not operated carefully at the time the fire originated. It is true the evidence tended to disprove certain evidence brought out by the plaintiff on cross examining the defendant's witness. For instance, the plaintiff on cross examining Roedick and B. King, Stokes and Pearsall, showed that all of the engines of the Texas & Pacific were properly equipped and kept in proper repair, and this evidence tended to disprove what was brought out by the plaintiff on cross examination. But we understand it to be a settled rule of law, that a litigant can not introduce evidence on cross examination or otherwise for the mere purpose of contradicting it by further evidence to be introduced by him.

Where a litigant calls out evidence on cross examination that is immaterial to the inquiry before the court, which he may do for the purpose of testing the witness, but the party introducing the material evidence is bound by it to the extent that he can not introduce independent evidence to contradict it.

To make the matter perfectly plain, suppose that the witness Edwards, whose evidence was objected to, and who saw the cinders fall on March 11, 1910, from some particular engine, say, for instance, No. 60, and suppose the witness Boedick had been asked if he had inspected engine No. 60, and he had stated that he had inspected it and had found it in bad condition, had a hole in the netting four inches square. Such evidence would have been immaterial and clearly not admissible, because engine No. 60 was not claimed to have started the fire. But suppose Boedick had stated in response to plaintiff's cross examination that engine No. 60 was in good condition, and then plaintiff had offered to contradict him, either by circumstances or by direct evidence of a man who saw him inspect it, and who saw it was in bad condition. The Court would not have admitted such evidence over our objection and should not have admitted any contradiction of the evidence as to the condition of the engine 60 being supposed to be the engine that Edwards saw throw the fire. Ordinarily when a witness on cross examination is asked about an immaterial matter the party is bound by the answer. We think this is in effect decided in the case of Railway vs. Koone, 69 T. 729, where it was held that under such circumstances the inquiry could not be extended further than the witness own statement and his connection with the prosecution. Citing First Greenleaf on Evidence 446. First Whorton on Evidence 448-454.

In the case of Dimmitt vs Robbins 74 T. 44, it is said: "It seems to be a well settled principle that the witness can not be cross examined as to any fact that is collateral and irrelevant to the issue, merely for the purpose of contradicting the witness." First Greenleaf on Evidence 449.

In the case of Suter vs. Wood 76 T. 408 it is stated:

"A witness can not be impeached by showing that he swore falsely as to an immaterial matter."

Wharton's Ev. Sec. 559, says: "In order to avoid an interminable multiplication of isues, it is the settled rule of practice, that when a witness is cross-examined on a matter collateral to the issues, he can not, as to his answer, be sub-

sequently contradicted by the party putting the question. The test of whether a fact inquired of in cross examination is collateral is this, Would the cross examining party be entitled to prove it as a part of his, tending to establish his plea? This limitation, however, only applies to answers on cross examination. It does not affect answers to the examination in chief."

Sec. 562. "It is competent, in order to discredit a witness to offer evidence attacking his character for truth and veracity. Particular independent facts, though bearing on the question of veracity, can not, however, be put in evidence for this purpose."

And in Jones on Ev. Sec. 827. It is stated: "Although witnesses may often be questioned on cross examination, as to matters collateral to the issue, for the purpose of testing their credibility it is a well settled rule that witnesses can not be interrogated as to matters wholly irrevelant, merely for the purpose of contradicting them by other evidence. Hence, if questions of this character are answered, the answer can not be contradicted by the cross examiner. If a party inquires of a witness as to immaterial matters, he must take the answer and can not raise an issue thereon by introducing evidence to contradict it."

Citing among the large number of cases Union Pacific Ry. vs. Reese, 56 Federal 288, C. C. A. 9th Circuit.

Whenever it is admitted as it must be admitted that the condition of engine No. 60 is immaterial, then the fact that it passed the Compress on March 11th, is immaterial, that Edwards saw it throw sparks is immaterial, and whether Boedick inspected it is immaterial. So the whole superstructure falls as for the want of a basis on which to stand.

We find no case where a person has been permitted to introduce collateral evidence for the sole purpose of impeaching and contradicting it.

So far as it rests on authority it fails in precedent.

Counsel argue that because Boedick's evidence went before the jury without objection it became lawful, that may be conceded, and defendant is not now complaining of such

evidence, the plaintiff is making that complaint, and asserting that his evidence is not true, then I ask them why did you introduce the evidence if you say it is not true. I ask them, do they want the evidence taken out of the case? They say no, we want it in the case so we can be allowed to introduce Edwards' evidence to contradict it.

The issue was as to the condition of these designated engines on March 8, 1910, the date of the fire. Neither side could be prejudiced by the good or bad condition of the engines that passed there on March 11, 1910.

Another view, suppose Edwards should be indicted for perjury for what he said about the engine passing there on March 11th, would it not be a perfect defense that the matter was not material. If that is true, then we have lost the protection that the sanctity of an oath affords.

Plaintiff desired to get Edwards' evidence before the jury, and have him exhibit the cinders he saw fall from the engine on March 11th. But they were afraid to make, or desired to avoid making the straight question, and contend that evidence of other fires is admissible when the derelict engine is designated, so they sought to complicate the question with the offer to contradict Boedick.

No such purpose was stated when the evidence was offered, but defendant's counsel were cited to the case of Railway vs. Richardson, 91 U. S.

In the case of Henderson vs. Philadelphia R., reported in 27 Am. St. Rep. 650, it is held that where the engine that started the fire is designated, then evidence of other fires is not admissible, and uses substantially the following argument: That it does not matter if every engine on the road is in good order, if the one that started the fire is in bad order, nor does it matter if every other engine is in bad order if the one that started the fire is good order.

But where the derelict engine is identified, evidence that other engines threw fire is not admissible, whether in rebuttal or not.

It would be admitted that it was highly damaging testimony to have Mr. Edwards exhibit to the jury large cinders

that he saw fall on the platform where the cotton was burned a few days after the fire.

An engine is only one of the servants by which a railroad performs its duty to the public, and it is not more permissible to show that one engine is defective as means of showing that another was defective, than it would be to show that one servant was negligent as a means of showing that another servant was negligent. Under the facts of this case, the railroad was called on to prove that passenger engine No. 359 was in good repair and was operated carefully while passing the compress. We introduced evidence to prove these facts as to each of the three engines. Now to disprove this, the plaintiff was permitted to prove that an engine passing there at 11 o'clock three days after the fire, threw large cinders on to the platform. Which portion of our evidence does the evidence of Edwards disprove? Does his evidence establish that the engine passing there on the 11th was in bad repair and therefore the engine passing there on the 8th was in bad repair, or does it establish that the engine passing there on the 11th was handled carelessly, and hence we may conclude that the engineer passing there on the 8th handled his engine carelessly. We submit that neither the condition of the engine nor the conduct of the engineer passing there on the 11th is admissible evidence to show the condition of the engine, or the conduct of the engineer of the engine passing there on the 8th, and we now proceed to refer to some of the authorities which we think clearly established our contention.

Attorneys for defendants in error on the trial cited us to the following authorities as sustaining the admissibility of Edwards testimony:

Northern Pacific vs. Lewis, 51 Fed. 658.
Chicago & St. Paul Ry. vs. Gilbert, 52 Fed. Rep 711.
Texas & Pacific vs. Watson, 190, U. S. 289.
Ry. vs. Richardson, 91 U. S. 454.

In the Lewis case it appeared that wood was cut upon the public lands of the United States without authority, or permission from the government, and piled along the rail-

road track preparatory to being shipped, and the wood was destroyed by fire emitted from some of the engines. The testimony tended to show that the fire originated from one of two certain locomotives, and that these and other locomotives had set other fires before and after the injury complained of. This evidence of fire started by other locomotives, was held admissible under the Richardson case in 91 U. S. 454. The Supreme Court of the United States on writ of error reversed the judgment on the ground that Lewis had no title to the wood, and it seems that the judgment of the U. S. Circuit Court of Appeals was so obviously wrong on the merits of the case that it should not receive much consideration on the other points as to admisibility of other engines throwing fire, and from the report of the case, that point does not seem to have been argued.

The case of Chicago & St. Paul Ry vs. Gilbert, a steam flouring mill and its contents, the property of Gilbert, was destroyed by fire. The question at issue was whether the fire was started from the mill or from an engine passing. The Court in holding evidence of other fires admissible, used this language:

"We must not in consideration of this question, lose sight of the issues involved. In the case at bar, it was not admitted by the company that the fire was caused by sparks escaping from any particular engine, in which event the query would be as to the condition of that particular engine, and the manner in which it was handled."

We understand that in the Watson case 190 U. S. 289, the evidence was not to show that other engines had thrown fire, but it was to show that other fires had been caused by the engine in question, and the Court ruled the evidence admissible.

In the case of Railway vs. Richardson, 91 U. S. 454 the Supreme Court uses this language:

"There are, it is true, some cases that seem to assert the opposite rule, it is of course indirect evidence if it be evidence at all. In this case it was proved that an engine run by the defendant, crossed the bridge not long before it took

afire. **The particular engine was not identified.**

This case is particularly reviewed by the U. S. Circuit Court of Appeals of the 8th Circuit, in the case of Lesser Cotton Compeny vs. St. Louis & Iron Mountain Southern Ry. 114 Federal Rep. page 136. In this case the evidence showed that the fire was started by engine 577, if started by any at all. The trial court rejected the evidence of other engines blowing the fire, and the Circuit Court affirming the ruling, uned this language:

"In support of the position that this evidence should have been received, counsel cite a large number of cases, which recite the remark of the Supreme Court in Railroad Co. vs. Richardson 91 U. S. 478, 23 L. Ed. 356, that 'such evidence has, we think, been generally held admissible as tending to prove the possibility, and a consequent probability that some locomotive caused the fire, and as tending to show a negligent habit of the officers and agents of the Railroad Company.' But we are not concerned in this case with the rule announced in the Richardson case. That rule is that, where the engine which could have set the fire is unknown, it is competent to show, not that other engines of the defendant sometimes set fires, but that some of the engines of the defendant set such fires."

And on page 138 the Court says:

"'Thus in Railroad Co. vs. Richardson 91 U. S. 454, 23 L. Ed. 356, the engine which caused the fire was unidentified. The evidence tended to show that it was one of the two locomotive engines belonging to the railroad company, but there is nothing in the case to indicate either that these engines were pointed out so as to separate them from the other engines of the defendant, or that the condition or the method of operation of either of them was in any way shown. The only question in that case was whether the fire was set by some unknown engine of the defendant or by a conflagration which the plaintiff maintained in the vicinity. In Railroad Co. vs. Gilbert 52 Fed. 711 E. C. A. 264, 265, 10 U. S. App. 375, 378, the Court well said, after citing the authorities which sustain the rule that governs the case at bar:

"We must not, in the consideration of this question, lose sight of the issues involved. In the case at bar it was not admitted by the company that the fire was caused by sparks escaping from a particular engine, in which event the querry would be as to the condition of that particular engine, and the mode in which it was handled."

And on page 139 it further says, 114 Fed.:

"These are the cases upon which counsel for the plaintiff seem to place their chief reliance. They do not sustain their contention, but concede the existence and reason of the rule that, where the engine charged with the injury is known, testimony of defects in the condition or negligence in the operation of other engines at other times and places is neither competent to prove, nor relevant to establish the real issue in controversy. There was no error in the rejection of the testimony of this character, or of that relative to the habit of the engineers to punch holes in the spark arresters of the defendant. The evidence offered upon these subjects was properly excluded."

So then it occurs to us that neither of the cases cited sustain the proposition that the evidence of other engines throwing fire on March 11th, was admissible. The evidence was not offered on the theory that the enigne throwing the fire on March 11th was one of the three engines near the Compress on March 8th when the fire started and the Court will recall that argument on the question was declined and the ruling promptly made that the evidence was admissible on the statement of plaintiff's attorney that the reported cases sustained their offer.

The above are the Federal cases that I have been able to discover. If we turn to the decisions by the Texas Courts, we will find that it is clearly established that where the engine started the fire is identified, that then the fact that other engines at other times threw sparks is not admissible.

In the case of Nusbaum vs. T. & B. V. Ry. 149 S. W. 1083, the Court said:

Error is assigned to the action of this Court for the exclusion of the testimony of Mrs. Emma Lee and Mrs. W.

D. Vickers, who lived near the appellee's railroad track, to the effect that before the burning of the cotton they had seen engines passing along said track and near said compress and emitting sparks in large quantities, and they often spoke of how dangerous it was, and wondered why greater caution was not taken in passing the compress where there was so much cotton stored.

There is no positive evidence that identifies the engine, if any, which set fire to the cotton, but we think, if it was so set afire that the circumstances are so convincing that there can be no doubt of the identity of the engine which did it. Engine No. 15 passed there at one o'clock a. m. Engine No. 12 passed at 2:20 a. m. Immediately thereafter the fire was discovered, which shows clearly that if set afire by a passing engine it was fired by sparks escaping from engine No. 12. The evidence excluded was as to sparks escaping at other and different times from the time No. 12 passed, and, as the identity of the engine that set fire to the cotton was established beyond controversy we are of the opinion that there was no error in excluding the evidence as complained of, especially as it does not show the emission of sparks was at or about the time of the fire. Morgan vs. Railway Co. 50 Tex. Civ. App. 110 S. W. 978.

In the case of Morgan Brothers vs. M. K. & T. 50 Civ. App. 441, the Court implies the following observation:

"Appellants sought to prove by the witness Psencik that he had on the 19th day of November, 1905, seen an engine of the appellee Railway Company set out a fire near Plum. An objection to the testimony was sustained and on this action of the court appellants base their thirty-seventh assignment of error. The testimony shows that the engine that was being operated at the time of the destruction of the cotton was No. 419. It was not attempted to be shown by Psencik that the engine which set out the fire near Plum was engine 419. The rule seems to be when the particular engine which caused the fire complained of can not be identified, evidence that sparks and burning coals were frequently dropped or fires set out by engines passing upon the same

road on other occasions, at about the time of the fire, is admissible to show habitual negligence and to make it probable that appellant's injury proceeded from the same cause. In the present case it is evident that the only engine which would have set out the fire that destroyed the compress and appellant's cotton was engine 419, and the inquiry was properly limited to the construction, condition and operation of that particular engine. San Antonio & A. P. Ry. Co. vs. Home Ins. Co. 70 S. W. Rep. 1000; Galveston H. & S. A. Ry. Co. vs. Chittim, 31 Texas Civ. App. 40.

If we will analyze the question at issue in the suits brought by the owner of property against the Railroad for having set fire from its engines we will see that certain questions arise. First, the first question to be determined is whether fire from the engines caused the property to be burned and in determining whether it did or not certain evidence is admissible that is not admissible on other questions arising in the case. If it should be contended by the defendant that the fire began to burn at too great a distance form the railroad track for it to have been started by the engine, then the evidence would be admissible showing the distance the fire had been thrown by other engines at other times in order to show that that place where the fire started was not beyond the range of sparks from locomotive engines without reference to any particular engine. But when we once come to examine the question as to whether the engine that threw the fire was properly equipped with spark arresters and was in proper repair or was properly handled, then we get no aid from proving that condition of other engines or in proving how they were handled.

When we come to prove whether the particular engine was properly equipped then of course we can show that that particular engine had caused other fires, and this is the question decided in the case of T. & P. vs. Watson 190 U. S. Reports.

In the case of Florida & East Coast Ry. vs. Welch 53 Florida 145 reported in 12 American and English Annonated cases 210, it was decided that where the particular engine

that started the fire was not identified, then the condition of other engines was admissible but in that case the judge quoted from another Florida case as follows:

"In the case of Jacksonville etc., R. Co. vs. Peninsular Land etc., Co. 27 Fla. 1, 9 Co. 661 L. R. A. 33, this Court held that where the fire resulting in injury complained of is shown to have been set by a particular locomotive, evidence of former fires set out by the same engine is admissible as tending to prove its defective construction or condition, or improper management, but fires set out by other locomotives are inadmissible because irrelevant."

There is quite a valuable note appended to that case in the annonated cases and I give some extracts from it.

"The following cases support the general rule that evidence of other fires by other engines of the defendant railroad company in the vicinity of the fire complained of and happening at or about the same time as such fire, is admissible as tending to show a possibility and consequent probability that the fire complained of originated from the cause alleged. These cases do not in terms limit the rule to cases where the particular engine causing the damage is not identified though it appears from an investigation of the cases that in perhaps all of them the particular engine causing the fire complained of was not identified.

United States Grand Trunk Ry. Co. vs. Richardson, 91 U. S. 454.

Gulf etc. R. Co. vs. Johnson, 54 Fed. Rep. 474 10 U. S. App. 629, 4 C. C. A. 447. See also Texas etc. R. Co. vs. Watson 190 U. S. 287, 23 U. S. Sup. Ct. Rep. 681.

R. Co. 62 Iowa 583, 13 N. W. Rep. 740, 17 N. W. Rep. 909.

Followed in Bell vs. Chicago etc. R. Co. Iowa 321, 20 N. W. Rep. 456.

IDENTIFICATION OF ENGINE CAUSING FIRE AS AFFECTING ADMISSIBILITY.

"In a number of jurisdictions it is held that where the particular engine supposed to have caused the fire complained of is identified, the plaintiff can not introduce evidence of other fires, or the emission of sparks by other engines of the defendant to show the origin of the fire."

Hoopeston First National Bank vs. Lake Erie etc. R. C. 174, Ill. 26, 50 N. E. Rep. 1023.

Cleveland etc. R. Co. vs. Loos 38 Ind. App. 1, 77 N. E. Rep. 948.

Ireland vs. Cincinnati etc. R. Co., 79 Mich. 163, 44 N. W. Rep. 426.

Hygienic Plate Ice Mfg. Co. vs. Raleigh etc, Air Line R. Co., 126 N. Car. 797, 36 S. E. Rep. 279.

Shelly vs. Philadelphia etc. R. Co., 211 Pa. St. 160, 165, 60 Atl. Rep. 581, 582.

San Antonio etc. R. Co. vs. Home Ins. Co. (Tex. Civ. App. 1902) 70 S. W. Rep. 999.

McFarland vs. Gulf etc. R. Co. (Tex. Civ. App. 1905) 88 S. W. Rep. 450.

Morgan vs. Missouri etc., R. Co. (Tex. Civ. App. 1908) 110 S. W. Rep. 978.

Norfolk etc. R. Co. vs. Briggs 103, 105, 48 S. E. Rep. 521, distinguishing.

Kimball vs. Borden 95 Va. 205, 28 S. E. Rep. 207.

See also

Jacksonville etc. R. Co. vs. Peninsular Land etc. Co. 27 Fla. 1, 9 So. Rep. 661.

Illinois Central R. Co. vs. Railway 222, Ill., 480, 78 N. E. Rep. 844, 17 L. R. A. 33.

Reaffirming 127 Ill. App. 41.

Fleming vs. Pullen (Tex. Civ. App. 1906) 97 S. W. Rep. 109.

Illinois Central R. Co. vs. Bailey 222 Ill., 480, 78 N.

Contra Ft Forth etc. R. Co. vs. Ratcliffe, Tex. App. Civ. Cas. 681.

And it has been held where the engine which alone could have set is identified, testimony that other engines of the defendant set fires or threw sparks at other times is incompetent in the absence of proof of similar conditions and operation.

Lesser Cotton Co. vs. St. Louis etc. R. Co. 114 Fed. Rep. 133, 52 C. C. A. 95. Where the engine which is supposed to have set the fire complained of is one of two identical engines, evidence of other fires or the emission of sparks by other engines is inadmisible.

Inman vs. Elbertton Aid Line R. Co. 90 Ga. 663, 16 S. E. Rep. 232.

Tribette vs. Illinois Central R. Co. 71 Miss. 212 13 So. Rep. 899.

Abert vs. Northern Cent. R. Co. 98 Pa. St. 316.

Gibbons vs. Wisconsin Valley R. Co. 58 Wis. 335, 17 N. W. Rep. 132.

Contra. Northern Pac. R. Co. vs. Lewis.

52 Fed. Rep. 658 and U. S. 254, 2 C. C. A. 446, reversed on other ground 162 U. S. 336, 16 U. S. Supreme Ct. Rep. 831.

Louisville etc. R. Co. vs. Short 110 Tenn. 713, S. W. Rep. 936.

In Gibbons vs. Wisconsin Valley R. Co. 58 Wis. 335, 17 N. W. Rep. 132, the Court said:

"The syllogism that because other locomotives on this road caused other fires at other times in the vicinity, therefore these two locomotives or one of them, which passed the place at this time, caused this particular fire, would be no more logical than that locomotive or some railway in another state, a thousand miles distant caused fires in the vicinity of the railway, on account of inefficient manufacture or repair, or other negligence. Evidence to be admissible in such cases, should have some relative bearing upon the issues either directly or remotely, and it is not perceptible how evidence that other locomotives at other times and places even on the same road and in the vicinity of the fire in question could have any such bearing. Evidence that other fires

had been set by the fire machinery managed by the company, before or after or about the time of the fire in question, is confined to the same machinery which caused such fire, and which may bear upon the question of the sufficiency of such machinery or its management and such are the authorities cited by the learned counsel of the respondent. There may be cases which hold that the locomotives of the company on the same road at different times before and after the fire in question, were so constructed as to scatter fire along its track, was competent evidence to show a possibility and therefore a probability that this particular fire was set by some one or more of such locomotives. But so far as I have examined such cases, they are those in which the locomotives which actually caused the burning were not identified."

"Where the engine which set fire can not be identified and the origin of the fire is unknown evidence that other engines owned and operated by the defendant had, under similar circumstances both before and after the fire in question, thrown sparks which caused other fires, is competent because of the difficulty of otherwise proving that the fire in question was started by sparks from the engine of the defendant.

Ala. G. S. R. Co. vs. Johnson 128 Ala. 283, 29 So. Rep. 771.

Birmingham etc., Co. vs. Martin 148 Ala. 8, 42, So. Rep. 618.

St. Louis etc., R. Co. vs. Lawrence 4 Indian Ter. 611, 76 S. W. Rep. 254.

Lakeside etc., R. Co. vs. Kelly 6 Ohio Ct. Dec. 555, 10 Ohio Cir Ct. 322, 3 Ohio Oec. 319.

Pennsylvania R. Co. vs. Stranahan 79 St. 405.

Henderson vs. Philadelphia etc. R. Co. 144 Pa. St. 22 Atl. Rep. 851, 16 LR. A. 299, 27 Am. Rep. 652.

Gowen vs. Glaser (Pa. 1886) 10 Atl. Rep. 417, 3 Cent. Rep. 109.

Galveston etc. R. Co. vs. Chittim, 31 Tex. Civ. App. 40, 71 S. W. Rep.

Nolan vs. Great Northern R. Co. Wash. 430, 71 Pac. Rep. 1098.

In Texas Midland R. Co. vs. Moore, (Texas Civ. App. 1903) 74 S. W. Rep. 942.

The locomotive which set the fire complained of had not been identified when evidence of other fires by other engines at different times was introduced by the plaintiff. The identification was made by the defendant's evidence after that of plaintiff had been introduced. It was held that when this was done, the defendant should have moved the Court to exclude from the consideration of the jury the evidence of other fires, and having failed to do so it would not complain on appeal of the admission of the evidence.

In the following cases the engine alleged to have caused the fire complained of was not identified, therefore an objection against the admission of evidence of other fires or the emission of sparks by other engines was held to be untenable. These cases do not necessarily decide that such evidence would be admissible in the case of identified engine.

Alabama etc. R. Co. vs. Aetna Ins. Co. 82, 770, 35 Rep. 304.

Chicago etc. R. Co. vs. Gilbert 52 Fed. Rep. 711, 10 U. S. App. 375, 3 C. C. A. 364.

Evansville etc. R. Co. vs. Keith & Ind. App. 57, 35 N. E. Rep. 296.

Louisville etc. R. Co. vs. Lange 13 Ind. App. 337, 41 N. E. Rep. 609.

Mills vs. Louisville etc. R. Co. 116 Ky. 309, 76 S. W. Rep. 29.

See also Manchester Assur Co. vs. Oregon R. Co. 46 Oregon 162, 79 Pac. Rep. 69 L. A. R. 114 Am. St. Rep. 863.

Koonts vs. Oregon R. Co. etc. 20 Oregon 3, 23 Pac. Rep. 820.

Smith vs. Central Vermont R. Co., 80 Vt. 208, 67 Atl. Rep. 535.

Hoskinson vs. Central Vermont R. Co. 66 Vt. 618, 30 Atl. Rep. 24.

In Allard vs. Chicago etc. R. Co. 73 Wis. 165, 40 N. W. Rep. 685, the Court held that mere proof that the screen or netting in the smoke stack of the engine in question was the same as on other engines did not open up the door for the admission of evidence on the part of the plaintiff which tended to prove that other engines on other occasions and under other circumstances started other fires. This was held to be especially true since the defendent did not prove or attempt to prove that such screens or netting on other locomotives did not emit sparks sufficient in size and quantity to set fires.

As to the objection that the evidence of Edwards was not in rebuttal.

In rebuttal plaintiff may offer any evidence that goes to disprove or reduce the force of the evidence offered by defendant. Now in this case the plaintiff introduced evidence tending to show the fire started from the engine, in fact tending to show it started from a certain engine at least from one of two engines.

Then defendant introduced no evidence tending to disprove that fact, but the defendant's own evidence tended to prove the same thing and offered other evidence excusing or confusing and avoiding the facts proven by plaintiff then plaintiff offered Edwards, not to disprove what defendant had proven, not to prove that the three engines in question were badly equipped or badly managed but to show that several days after the fire there were indications that some engine on defendants road was badly equipped or badly managed.

That the admission of the evidence objected to was fatal to the defendant's case there can hardly be any question. Up to the time of the introduction of this testimony plaintiff's case was weak, and against the weak case made out by the plaintiff upon the introduction of the testimony in chief,

the defendant by the best testimony obtainable in cases of this character very clearly and unequivocally disproved the charge of negligence which the evidence introduced in chief tended to show against it. It was then that the plaintiff proved by Edwards that three days after the fire, engines passing the compress threw out enormous burning cinders. The jury heard the objections made to this testimony and heard the court overrule the objection. They understood that all testimony admitted by the court was to be considered by them. That the jury considered this evidence is proof that the defendant was guilty of negligence either in the condition of its spark arresting apparatus or in the management of its engines is just as certain as that the court admitted the testimony over the defendant's objection, and that it had a controlling effect upon the jury in arriving at their verdict is as far removed from doubt as the truth of either of the other propositions.

If the cotton was set on fire by sparks coming from a locomotive, they came from either engine 140 or 202 or 359. If these engines were properly equipped with spark arresters and were properly handled, then the defendant was free from negligence, and any recovery against it is absolutely without any justification in law. The testimony offered by the defendant showed conclusively that all three of these engines were properly equipped with spark arresters in good repair, and, that, therefore, the defendant was without negligence. It was not only not shown but it was not even claimed that the engines passing when the witness Edwards saw enormous burning sparks fall on the platform was either one of the three engines mentioned. Edwards was not an eye witness to the fire, and the jury understood this. The issue under investigation when he testified was whether or not the defendant was negligent either in reference to the condition of the spark arresting apparatus or in the operation of its engine which emitted sparks several days before Edwards arrived upon the scene. His testimony was offered to prove one or both acts of negligence. The court admitted his testimony to be considered by the jury in de-

termining whether or not the engine which emitted sparks causing the fire was either in a negligent condition or negligently handled, and the jury considered this evidence for this purpose, for they could not have considered it for any other purpose. The jury being unlearned in the law as to the admission of evidence and being guided by the ruling of the court that this evidence was admissible upon the issue, considered it against the defendant in determining whether or not one of the only three engines which could have emitted sparks, was in a negligent condition or negligently handled. This testimony was of the most damaging character, and its admission by the court and the consideration by the jury led to the verdict against the defendant which otherwise in all probability would have been in its favor.

As has been shown by a review of the authorities, the law is clearly against the admission of the testimony objected to. Its admission, therefore, over the defendant's objection was a violation of the defendant's legal rights. This testimony was most damaging in its character upon the vital issues in the case, and therefore, its admission adversely affected the substantial rights of the defendant. There is no escape from the conclusion that the verdict of the jury was largely, if not solely, based upon this testimony, and there is no escape from this verdict, legally and substantially wrong, except through a reversal and a new trial.

Under the admitted facts in this case the Court should have instructed the jury as requested by the Railway Company, that the Compress company was guilty of negligence which contributed to the destruction of the cotton by fire. I attach hereto a plat showing the situation surrounding the cotton. The evidence showed without contradiction that the Compress was on a steep up-grade going west, that it is on the north side of the track and on the day of the fire there was a high wind blowing from the south, directly from the engine to the cotton. That a portion of the cotton at the Compress was on the railroad right of way, that the fire

started in the cotton that was stored on the right of way and was then communicated to other cotton.

The plaintiff Rosborough alleged that both the Railway Company and the Compress Company were negligent. The Railway Company was negligent in allowing its engines to emit sparks and start the fire, and the Compress Company was negligent in placing the cotton in a place exposed to the fire from sparks, and the Court had charged that the plaintiff could not recover if the Compress Company was negligent. (Rec. 119). So far as this writ of error is concerned only the plaintiff and the Railway Company are interested.

Rosborough alleges that the Compress Company was negligent and he has recovered a judgment on the theory that the Compress Company was not negligent.

The effect of the Court's charge on the effect of the negligence of the Compress Company (Rec. 119) was to tell the jury that if the plaintiff's allegation was true the Railway Company was not liable.

We will assume that plaintiff made out a prima facie case by showing that the engines started the fire. Then under the rule of law established in Texas, if not in other jurisdictions, there was a legal presumption against the Railroad Company for these several acts of negligence.

First, that it had not adopted the most approved spark arresters.

Second, the spark arresters were not kept in proper repair.

Third, the engine on the occasion in question was not properly handled.

Fourth, that it had allowed combustible material to accumulate on its right of way where the fire started.

Applying these rules of law to the case in hand, we have it that plaintiff's evidence and the uncontradicted evidence of defendant's shows, that the fire was started either by engine No. 140, operated by LeBaum, or by engine No. 202 operated by Maxfield, or engine 359 operated by Ramsey, or that it allowed combustible material to accumulate on the

right of way, where the fire started. The fire was started on March 8th, about four p. m. The witness, Edwards, to whose evidence we objected was there on March 11th, about 11 a. m. and saw an engine going west throwing large quantities of cinders, some of them burning cinders, which fell on the platform and on the cotton. Now in order to make that evidence admissible, it occurs to us that it should disprove some of the evidence introduced by the defendant company. That is, it should tend to prove either of some one of the following propositions:

That engine 140 was not properly equipped with spark arresters, or that it was not in good repair.

Or that its engineer LeBaum was negligent on that occasion.

Or that engine 202 was not properly equipped or was not in good repair, or that its engineer, Maxfield, was not careful on that occasion.

Or it must tend to prove that engine 359 was not properly equipped, or was not in proper repair, or that its engineer Ramsey was not careful on that occasion.

Now it seems too clear for further argument that Edwards evidence, as to what occurred on March 11th, did not disprove either one of these facts and did not tend to disprove that. If Edwards evidence was admissible at all, then it must be admissible to contradict the evidence of Langton, who testified in a general way as to the character of spark arresters that were adopted by the Texas & Pacific Railway Company.

Langtons' evidence had been clearly misunderstood by the Circuit Court of Appeals. That Court seems to intimate in its opinion that the evidence of Langton went to show that all of the Texas & Pacific engines were equipped with the standard spark arresters. That evidence was in the nature of expert evidence, to show the propriety of adopting the particular character of spark arester that the Texas & Pacific Railway had adopted. He did not profess to know anything about the actual conditions of any of the engines in question, or the kind of spark arrester that was actually

installed on the Texas & Pacific engines. The other witness testified as to the character of spark arresting devices actually in use on the Texas & Pacific Railway and Langton, as an expert, testified that that kind was one of the best known characters of spark arresters.

The District Judge, who tried the case, did not favor us with the grounds for holding the evidence of Edwards to be admissible, and the Circuit Court of Appeals in affirming the judgment do not discuss the question further than to use the following language:

"Under the isues made by the pleading and considering the evidence offered by the defendant more or less tending to show that its locomotives were all equipped with a standard spark arrester kept in order and well handled, the evidence of Edwards complained of was not irrevelant nor immaterial. That it was somewhat remote goes to its effect. Because the evidence of the defendant showed that the fire was started by one of three certain engines, numbers 359, 140 and 202, and Edwards evidence related to the action and the handling of another and different engine two days after the fire did not warrant striking the evidence of Edwards from the record."

It was the purpose of the defendant in introducing its evidence to confine that evidence, first to the character of spark arrester adopted by the Texas & Pacific Railway Co. and then to show that that kind was in use on each of the three engines in question, and that the spark arrester on each of the engines was in good condition and properly handled at the date of the fire.

I have examined the evidence brought up in the record, and if we will exclude the evidence brought in on cross examination of defendant's witness, I can find no evidence of the defendant that tended to show the condition of any other engine except the three engines in question that passed the Compress on the date of the fire, and we think we have established the rule that plaintiff can not by cross examining the defendant's witness, lay the foundation for the introduction of evidence by the plaintiff to contradict the evi-

dence brought out by the plaintiff on cross examination of defendant's witness.

The other presumption that arises against the Railway Company by proving that sparks from the engine started the fire is that we had combustible material on our right of way and if that is shown, then the Railway Company is liable even though it had the best spark arresters and kept them in good repair and operated the engines carefully.

We are relieved of rebutting that presumption in this case by showing that the Compress Company placed the combustible material on our right of way which was the direct cause of the cotton being burned, and the fire started in the cotton that had been placed on our right of way, and if that act would constitute negligence on the part of the Railroad, it seems that it should constitute negligence also on the part of the Compress Company, and hence the evidence as well as the pleading of plaintiff establishes the fact that the Compress Company was guilty of negligence which contributed to cause the cotton to be burned.

In many of the adjudged cases the rule is stated to be that the fact that other engines threw fire is admisisble when the engine that started the fire in question was identified, but in very many of such cases when examined it will appear that the engine that threw the fire in question in the particular case was not identified or the specific issue in the case called for such evidence. Also many of the cases will show when looked into that the issue to be tried was different from the question we are now dealing with.

For example, suppose defendant should contend that its engines will not throw fire the distance shown to have been thrown in the case then being tried, then the fact that some engines had been known to throw fire that great a distance would clearly be admissible. Suppose the defendant should contend that for any reason no engine could have started the fire in question, then the plaintiff could show that some engine, or one engine of defendant had been known to start similar fires.

In the case at bar the evidence pretty clearly showed that

the fire was started by one of three engines. This was not denied by defendant but confessed and avoided, by showing the condition and the handling of those three engines.

Plaintiff then sought to show in rebuttal the condition and handling, not of these three engines, but of other engines handled by other employes, such we say was foreign to the issue to be tried.

SECOND.

The Railway Company requested these two charges:

"It appears that the place where the fire started was on the right of way of the Railway Company.

And there is no evidence that the Railway Company had any control of the cotton.

Therefore the fact that the cotton was on the right of way resulted in its being burned.

Therefore the Railway Company is not liable.

"If you believe that a portion of the platform of the Compress Company was on the right of way of the Texas & Pacific Railway Company, and you believe that the Railway Company permitted the use by the Compress Company that part of the platform on its right of way for the purpose of loading and unloading cotton on or from said cars, but the railway had not agreed to the use of that part of the platform by the Compress Company for the purpose of storing cotton, and if you find that the cotton where the fire started was on the railroad right of way, then the railway would not be liable."

These questions are presented in our third and fifth assigned errors.

It is definitely settled by the decisions in Texas that a railroad in order to excuse itself from having started a fire along its right of way must establish the following facts:

First: It must have on its engines approved spark arresters and have them in good repair.

The engine must be operated carefully.

The Railroad must keep its right of way clear of combustible material.

In Le Roy Fisher Co., vs Chicago R. R. decided this court, February 24, 1914, the combustible material was on plaintiff's land, here it is on defendant's land.

If it establishes these facts, it is not responsible for fire started from its engines.

The courts have held that if the railroad allows combustible material to accumulate on its right of way, it would be liable for fires started from its engines no matter how good the spark arresters may be and how carefully handled.

G. H. & S. A. vs. Polk, 28 S. W. 353.
G. H. & S. A. vs. Rowland, 23 S. W. 421.
Railway vs. Cusenberry, 26 S. W. 43, (Sup. Ct.)
Freeman vs. Waters, 136 S. W. 84.

Now suppose the Railway Company had placed the cotton on its right of way, or other combustible material at the very point where the fire started on this occasion, then the railway would be liable, although it had used the best spark arresters, keeping them in good repair and operating them carefully, because leaving the combustible material on the right of way would in the language of the law itself constitute negligence on the part of the Railway Company if fire starts therein and is conveyed to adjoining property, the only difference between the case supposed and the one at bar is this:

In the case at bar the Compress Company placed the cambustible material on the right of way and at a place where if the railroad had placed it, it would have been giulty of negligence and liable for the damages caused by fire starting from such combustible material. In this view of the case, I am unable to see how the Compress Company can escape liability for its own negligence it having placed the cotton, which is combustible, at a point on the right of way and the fire started from that point, which would have made the Railway Company liable if it had allowed combustible material to accumulate at that particular point. But in this case by reason of the direction given to it by the charge given, and the charge refused, the effect is to permit the Compress Company to go free from any charge of negligence, although the Railway Company would have been neg-

ligent if it had done the very things that have been done by the Compress Company.

Therefore we think the charge requested should have been given.

It has been held in a number of cases that if our evidence is true as to the condition and operation of our engines, we have rebutted the presumption of negligence that arises from the fact that the engines had started the fire. If the fact that the engine started the fire is sufficient to disprove and rebut the evidence showing that the engines were in good repair as to spark arresters and well managed, then we can not see any reason why that evidence should not be sufficient in any case.

In the case of Martin Wise and Fitzhugh vs. Railway 87 Texas 118, a case very similar to the one at bar, both the court and jury held that the evidence of negligence arising by reason of the engine starting the fire was rebutted by just such proof as we have made in this case and there is no difference in principal between the rule in that case and the one we are now contending for.

Our Supreme Court in passing upon this defense, in the case of Texas & Pacific Railway Company vs. Levine 97 T. 439, the Supreme Court holds that a jury should not be permitted to disregard the evidence showing that the engines were properly equipped and properly handled. The theory of our law is that where the sparks from the engine started the fire, then there is a presumption that the company was guilty of negligence, although there is no other proof of negligence, which presupposes that the Railroad Company may rebut that presumption by introducing proof that it has complied with everything required by the law and this is in effect the holding in Receiver vs. Goodwin 87 T. 276.

But the specific question that we are especially concerned in here, is this: The Compress Company built its compress on the side of a hill, and put a portion of its platform on a part of the right of way of the Railway Company. That did not prove any permission to put the cotton there, and it is not known that the Railway Company had any informa-

tion that the cotton was on its right of way in that exposed condition, and it must be especially borne in mind that the cotton was not placed out on the platform for the purpose of being shipped in the cars, but it was placed there for the purpose of being put in good condition, sampled and sold and compressed before it was shipped, so the Compress Company was using this right of way for its own convenience and not at all in connection with the Railroad Company's handling of the cotton.

In the case of Hartford Fire Insurance Company vs. Chicago Railroad 70 Fed. Rep. 203. The Circuit Court of Appeals had under consideration the question as to whether the Railroad Company could lease a portion of its right of way to shippers and providing the company would not be liable for property destroyed on the leased premises by negligence, the court uses this language in discussing the lease:

"Before the lease was made, the lessee had no right to enter upon or to place any property upon the leased premises, and the Railway Company owed to the lessees no duty to exercise ordinary care not to set fire to any property on those premises, because, presumptively, there was none there, and because, if any one put any there, the only duty of the company was not wilfully and wantonly to injure it, because it would be there in violation of law."

The Court then goes on to hold that if it had leased the property without restriction it would have to exercise ordinary care to prevent its destruction, and then further holds that it could put such restriction on the lease as it should desire.

Further on in the opinion, the court says: That the law imposes no duty on a railroad company to lease its right of way or to use ordinary care not to set fire that would burn property placed upon it by strangers without its permission. The Court calls attention also on page 204 to the fact that the property destroyed was not in process of transportation by the Railway Company, nor was it awaiting delivery to the consignee. Now applying the reason in that case to the case now before the court: The Compress Company

had its cotton placed on the railroad right of way without its consent or permission so far as this evidence showed and without any information on the part of the railroad that at that particular time there was cotton stored on its right of way, it being upgrade and a high wind blowing from the engine towards the cotton, made it important that the danger from sparks on that particular occasion should have been known to the Railroad Company.

In the case of T. & P. vs. Ross 7 Civ. App. 657, wood had been placed near the track for shipment and grass and weeds took fire from the engine and burned the wood. The Railway Company was held liable on account of the combustible grass and weeds being on the right of way and the wood having been put there for shipment, the owner did not take the risk of the dry grass being ignited.

In the Ft. Worth & R. G. Ry. vs. Dial 85 S. W. 22, the Court held that the railway was bound to exercise only the care that a man of ordinary prudence would use, and that the owner of straw stacked near the railway must exercise the same care. He must use care to prevent weeds and grass from accumulating near the stacks that might cause the stacks to burn. To the same effect St. L. & S. W. vs. Crabb 80 S. W. 408.

In Rutherford vs. Texas & Pacific 61 S. W. 422. Rutherford's barn was on his own land, and the railroad had allowed shucks to accumulate on its right of way, which caused fire and communicated same to the barn. Held the railway was liable.

We refer herein to some of the Texas cases involving the qeustion in this case. In Railway vs. Hogsett 67 T. 688, the Court held that to allow combustible material to remain on the right of way is itself negligence, and the same rule was held in Railway vs. Witte 68 T. 298.

In the G. C. & S. F. Ry. vs. Reagan, 32 S. W. 846, it was held negligence to permit combustible material on the right of way if that caused the fire.

In the case of G. C. & S. F. vs. Rowland, 23 S. W. 421, it

was held negligence as a matter of law to permit combustible material on the right of way.

In the case of T. & P. vs. Gaines, 26 S. W. 433, it was held negligence to permit combustible material to remain on the right of way when fire was thereby communicated to the property of others. The rule of law requires the Railway Company to show the condition of its engines, because the facts relative to the condition of the engines, is best known to the Railway Company and is not known to the person whose property is destroyed.

Ry. vs. Horne, 69 T. 648.
Ryan vs. M., K. & T., 65 T. 20.
Ft. W. & D. Ry. vs. Wallace, 74 T. 585.

It would be a very unjust rule to require the railroad company to introduce evidence to show the good condition of the engines and when they have done that, then to say the evidence is not true, because of the fact that the engine did throw out sparks because it has been time and again held that the throwing of sparks does not necessarily mean that the railway company is negligent, and that is the only evidence that has been introduced in this case to show that the evidence given by the Railway Company as to the condition of the engines is not true.

In T. & P. vs. Gaines, 26 S. W. 873 it was held negligence to allow combustible material to remain on the right of way.

In the case of M., K. & T. vs. Goode, 26 S. W. 442, the railway was held liable because they did not rebut the presumption arising from starting the fire.

In the case of Texas & Pacific vs. Levine, 29 S. W. 466, the Court said that if the presumed negligence is rebutted by the Railway Company, the trial court should grant a new trial.

In this case we are not making the contention that the Railway Company may by negligence burn cotton placed near the track, but we say that when cotton is placed so near the track as that a jury may find it negligently placed there, and when the fire is started by an engine under circumstan-

ces that might show negligence in the Railway, then the prima facie case in favor of plaintiff's recovery would not exist. There might be a prima facie case of the fact that the Railway Company was negligent because of its engines having started the fire, but there would also be a prima facie case of negligence in the cotton owner in placing his cotton so near the track and in such case there would be a difference between a prima facie case of plaintiff's negligence and a prima facie case of plaintiff's right to recover. If the cotton owner should place his cotton so near the track under circumstances as that it would likely be burned when the Railroad Company was not guilty of negligence then the presumption would arise against the cotton owner that he was negligent, which if not rebutted, would destroy his right of recovery and prevent his taking advantage of a prima facie case of negligence against the Railroad Company. This is but another application of the ordinary rule of law, which is that a plaintiff suing for personal injury has only to show the negligence of the defendant and resulting injury, but if the plaintiff's own evidence in showing his connection with the injury should arise, a question of his own negligence contributed to the injury, then a prima facie made by the negligence of the defendant would be rebutted. This rule is established in the case of Railroad vs. Cowser, 57 T. 302, Murry vs. Railroad, 73 T. page 6 and authorities cited. So in the case at bar the plaintiffs were required to show, first, the negligence of the Railroad Company which started the fire, second, he should show his own connection with the starting of the fire and in doing this it has appeared that he placed the cotton in such close proximity to the railroad as that it might be burned by reason of sparks from the engines, when the railroad was in fact guilty of no negligence, either in the construction or operation of its spark arresters, and this being the case, there was no prima facie right for recovery by reason of the fact that the fire started from the engine although there might be a prima facie case of negligence on the part of the Railroad Company.

We think this question is presented by the record under

the charge requested by the Railroad Company and refused, which is presented in our eighth assigned error, the special charge being as follows:

"You are instructed that if you believe from the evidence that the plaintiff W. J. Rosborough, caused his cotton to be placed with the Marshall Compress Company at its compress and that at the time of the fire complained of and prior thereto, said Compress Company had the custody or care of said cotton for said plaintiff, and if you believe from the evidence that said Compress Company had other cotton at its compress and that plaintiff's cotton and said other cotton was on its platform at its compress and that said compress company either caused or permitted any of the plaintiffs' cotton or any other cotton, which it had at its compress to be placed out on an open platform so close to the railroad as to render it in danger of catching fire from sparks coming from a passing locomotive or if you believe it permitted or left loose cotton on or over its platform or left bales of cotton exposed with the top ends uncovered which was likely to catch fire from sparks coming from a passing locomotive, and if you believe that the acts, if any, or omissions, if any, on the part of said Compress Company in relation to said cotton, was such as a person of ordinary prudence would not have done or left undone in view of the probable danger of fire from passing locomotives, if such danger was probable, and if you further believe that such acts, if any, or omissions, if any, contributed to cause said cotton to catch fire, and that said fire destroyed the cotton involved in this suit, then you will find for the defendant although you may believe from the evidence that the defendant was also guilty of negligence but for which fire would not have occurred."

It was our sixth special instruction requested. (Record page 128).

This matter we know was presented by the court in its main charge but presented more as an abstract proposition wherein the jury were not directed as to the particular facts presented as a defense.

We submit upon the whole case, that the Court erred. First. The Court erred in admitting the evidence of Edwards as to his observing sparks thrown from an engine on March 11, 1910, which was three days after the fire occurred.

In order to make the matter plain we present the matter in the form or nature of a problem. When the evidence of Edwards was offered by the plaintiff the plaintiff had closed his case and the defendant had introduced its evidence and closed its case.

And the defendant's evidence had definitely identified the engine that threw the fire as being one of three engines, either No. 140, 202 or 359. These facts are not referred to as a basis for the contention that the admission of the evidence was error because it should have been offered before the plaintiff closed. But these facts demonstrate more clearly that the evidence of Edwards was foreign to the real issue.

Plaintiff proved that the fire come from the engine and burned the cotton, and the value and ownership of the cotton, and rested his case evidently relying on the rule and presumption of law that these facts made a prima facie case that the engine was defectively equipped or negligently handled.

Defendant introduced its evidence tending to deny and rebut the prima facie case made by plaintiff, by showing engines properly equipped and carefully handled. Then the plaintiff had the right to introduce any evidence that would deny, rebut or modify or explain the defense we had proven, and, in the discretion of the court, he could strengthen his prima facie case.

His prima facie case was this that the following engines were not properly equipped or were not properly handled.

No. 140, operated by LeBaum.
No. 202, operated by Maxfield.
No. 359, operated by Ramsey.

Now let's assume that the engine that Edwards saw on

March 11, 1910, was engine No. 293 as identified by Train Dispatcher McCullough, (Record p. 26) and operated by "Smith." The cotton was burned March 8, 1910. Now instead of using the three engines that passed on March 8th, in our illustration, we will use one No. 140 operated by LeBaum as representing all three. So then plaintiff's prima facie case was that engine 140 was defective or LeBaum was negligent, we answer that, by proving LeBaum was careful and his engine in good repair.

This situation presents a sharp issue.

1. Was LeBaum careful.
2. Was engine 140 in good repair.

1. The real issue is not whether LeBaum was a careful engineer, but was he careful on March 8th, while passing the Compress, any evidence is admissible that bears on this issue.

Plaintiff has asserted the right to prove that "Smith" who operated engine 293 along there on March 11th, was negligent as a method of showing that LeBaum who passed there on March 8th, was negligent. Now if plaintiff offers evidence to show that "Smith" was negligent on March 11th, we would be allowed to offer evidence that "Smith" was careful on March 11th, and we would then have drifted away from the real issue, and tried an issue not presented by the plaintiff, and the determination of which would not aid either party.

Then again after investigation the defendant might safely admit that Smith was negligent while passing the Compress on March 11th, and not in the least affect the issue to be tried.

2. The elements of the prima facie case, are that engine No. 140 did not have good spark arresters. The defendant met this issue squarely by proof that it was in good condition. The plaintiff then to disprove defendant's evidence and to strengthen the prima facie case, proved, not that defendant's witness had sworn falsely as to the condition of engine No. 140, but that engine 293 was not in the condition that

defendant's witness testified was the condition of engine 140. It seems clear that the condition of engine 293 was not put in issue by plaintiff's pleading nor by defendant's evidence. When we come to consider the condition of engine No. 293 defendant might deny its bad condition, might justify its bad condition or might admit its bad condition, and confess to liability for all damages it had done, another view, suppose when plaintiff made his prima facie case against engine No. 140 that defendant had offered proof not as to the condition of No. 140 but the good condition of 293, which passed there March 11th, could such evidence have been properly admitted? Surely not.

Suppose the jury had returned a special verdict, first that No. 140 was in good repair, that LeBaum was careful, that engine 293 was in bad repair and Edwards evidence was true, what judgment should have been rendered on such a verdict? No doubt for defendant.

But it is contended that Langton testified that defendant had adopted a certain kind of spark arrester and that kind was the standard that is true, but he gave no testimony as to the condition of engine No. 293 or No. 140 and Edwards testimony did not end to contradict the testimony of Langton. Langton says defendant adopted the standard netting and put in on all its engines. Edwards says No. 293 threw fire on March 11th, to the extent that proved it was not in good repair, would such evidence prove that the defendant had not adopted the standard or that the standard was not good?

We pray that the judgment be reversed.

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